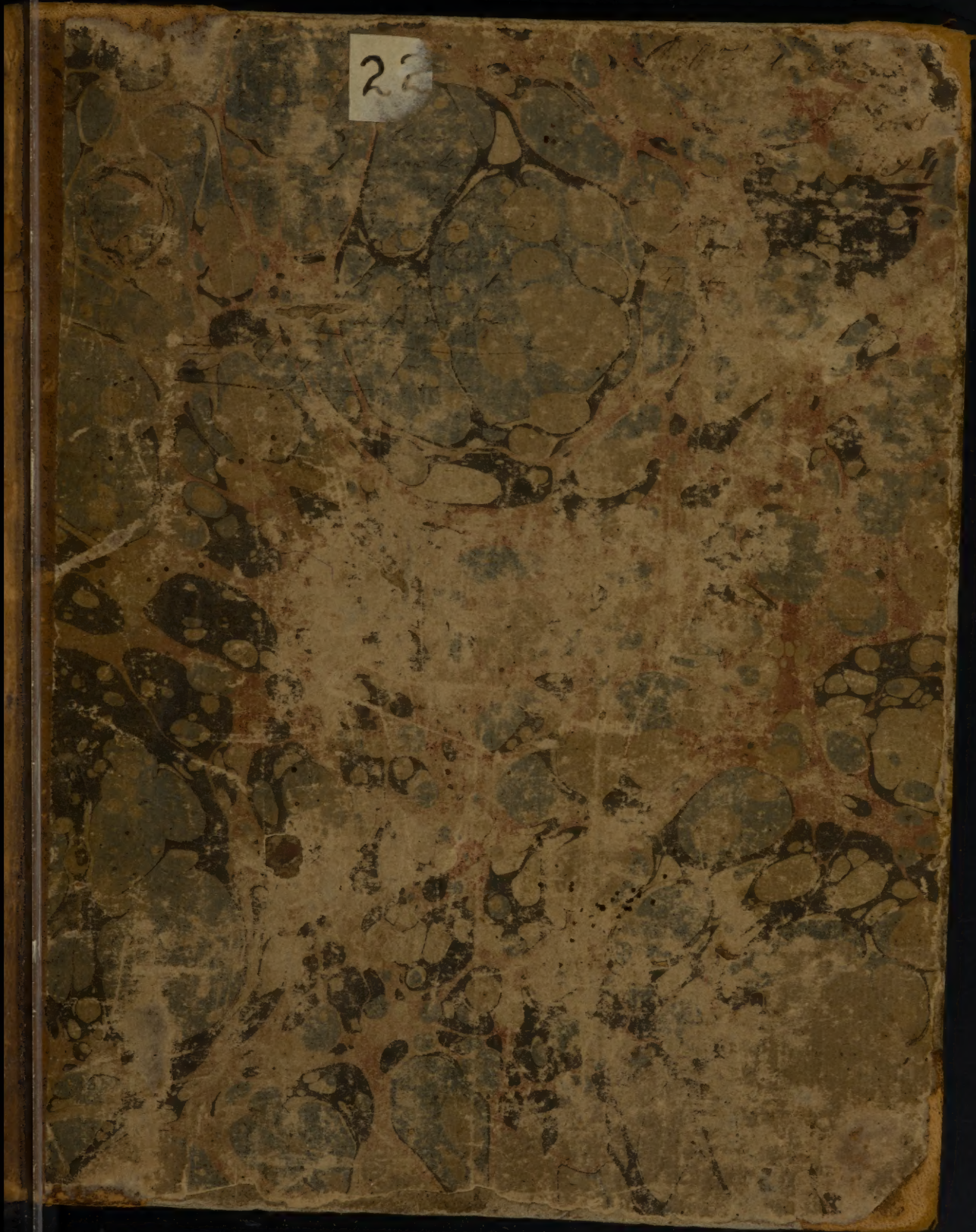


22



Parol evidence is let in to rebut an equity & only where there is a rule of law that Chancery have broke in upon, in such cases & in no other, proof is let in to rebut that equitable construction & restore the old legal ~~rule~~.

In Eng^d the law was formerly that the Ex^r should have the residuum whether he had a legacy or not, but now if he has a legacy left him, he shall not have the residuum. But in this State he ~~can never have been entitled to~~ ^{never has been entitled to} the residuum, & it seems clear even upon ^{the} English principle that where he owed the testator a debt he will be obliged to distribute it to the next of kin, for in Eng^d where he has a legacy and on that account is excluded from the residuum, his debt composing a part of such residuum must be distributed to the next of kin.

See Salk 305-3 Alk 68-3 Pym 40-2 very 9/
1 Wills. 313-1 Vern. 473-1 Bro. Can. 201, 328

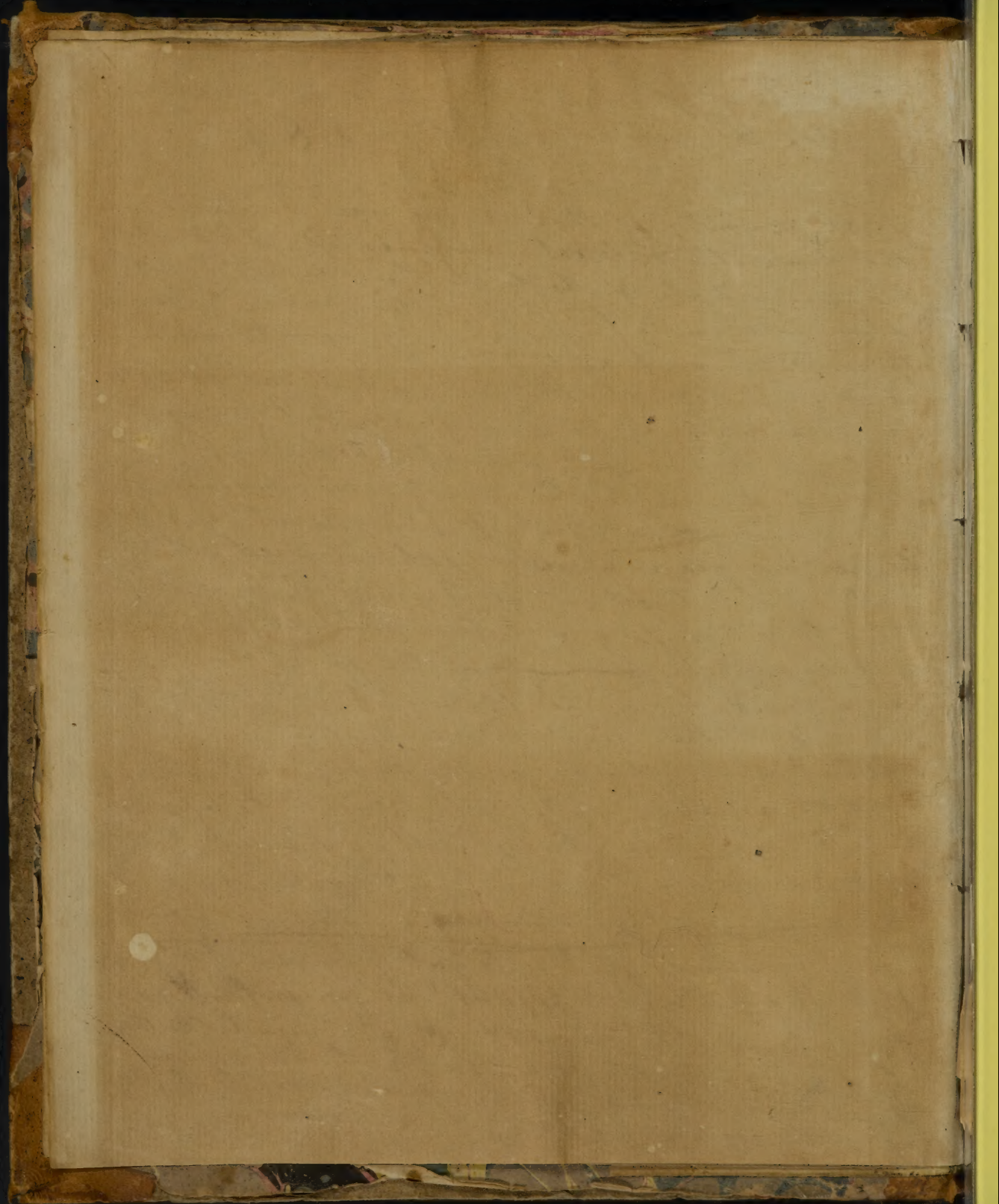
The question whether an Ex^r can be excused from distributing such debt may make a figure in this State.

Where a ~~Ex^r~~ dies leaving an Ex^r, the last Ex^r may accept the last Executorship without accepting that of the former testator, but he cannot accept that of the former without accepting the latter.

Mode of computing interest, established
by the Superior Court in 1784 ^{on Notes &c}

Compute the interest to the time of the first payment; if that be one year or more from the time the interest commenced; add it to the principal, & deduct the payment from the sum total. - If there be after payments, compute the interest on the balance due to the next payment and then deduct the payment as above; and in like manner from one payment to another, till all the payments are absorbed; provided the time between one payment and another be one year or more. - But if any payment be made before one year's interest hath accrued, then compute the interest on the principal sum due on the obligation for one year, add it to the principal, and compute ~~from~~ the interest on the sum paid, from the time it was paid, up to the end of the year; add it to the sum paid, & deduct that sum from the principal & interest added as above. - If any payment be made of a less sum than the interest arisen at the time of such payment, no interest is to be computed but only on the principal sum for any period.

"The meaning of the legal phrase of 'wray-ing the party to demand' is an infant moves to suspend the proceedings at law till he arrives at full age - so that he may then have his election what point of defense to rely on"



First U. S. Law School Restored For Washington Bicentennial

Litchfield, Conn., Commemorates President's Visit
in 1780 on August 27 in Building Tapping
Reeve Erected on His Estate for the Institution

Special to the Herald Tribune

LITCHFIELD, Conn., Aug. 6.—In commemoration of a visit by George Washington to the village in 1780, Litchfield will celebrate the Washington Bicentennial on August 27. While honoring the memory of the first President, Litchfield will also pay homage to its native sons who played prominent parts in the nation's life during the early part of its existence. Among these are General Oliver Wolcott, Colonel Benjamin Tallmadge, Judge Tapping Reeve, founder of the first law school in America, and Judge James Gould, Reeve's partner and successor.

Washington, journeying from Hartford to West Point, stopped in Litchfield as the guest of Oliver Wolcott, a signer of the Declaration of Independence, member of the Continental Congress, and later a Governor of Connecticut. It was just at the time that Benedict Arnold was fomenting his plot to betray West Point to the British and possibly the American commander in chief would fall into Arnold's trap. Thus, Washington's presence in Litchfield is venerated more, because it was at a time of unforeseen peril.

Made Friends in Litchfield

The Wolcott mansion on North Street had been the scene of a strange incident a few years before. General Wolcott had stopped in New York while returning from the Continental Congress in 1776, and returning to Litchfield he took with him the headless torso of the leaden statue of George III, which had been pulled from its pedestal in the Battery by an excited mob of patriots. In Wolcott's home his daughters and friends melted the statue and recast it into some 42,000 bullets for the Colonial Army.

While in Litchfield Washington became better acquainted with young Oliver Wolcott, who later served in his Cabinet as Secretary of the Treasury as the successor of Alexander Hamilton. He also talked with Tapping Reeve, a young lawyer, who had served as a recruiting officer at the opening of the war and had gone to New York with a group of freshly recruited troops in a diversion movement aimed to rescue Washington in his retreat through New Jersey.

Reeve lived in a spacious house opposite the home of Oliver Wolcott. In later years, when his law school had become well established, he erected at the south side of his home a small building to serve as a law school. It is in this Little Law School building and the adjoining mansion, now restored to its original design, with its relics of its master and his pupils, augmented with an exhibition of Washington, gathered from many sources, that the Washington bicentennial celebration will be centered this month.

After graduation from Princeton in 1763 and serving as a tutor there for a few years, Reeve removed to Litchfield to practice law. With him he brought his wife, Sally, sister of Aaron Burr and granddaughter of Jonathan Edwards. This was in 1772. Three years later his brother-in-law came to study law under him. Thus, Aaron Burr was the first of a long list of young men, later to become distinguished in many branches of the nation's life, who gained their legal knowledge from Tapping Reeve and the school which he founded.

They came from all parts of the Union—John C. Calhoun, young Oliver Wolcott, Peter B. Porter, Levi Woodbury, John Y. Mason, John M. Clayton, Ephraim Kirby, Ward E. Hunt, Horace Mann, Uriah Tracy, Stephen R. Bradley and many others. Of the students who studied in the Litchfield Law School, two became Vice-Presidents of the United States, six were members of Presidential Cabinets, three became justices of the United States Supreme Court, eighty-eight served as members of the House of Representatives, twenty-five were members of the Senate, fourteen were state Governors and many served in minor executive, judicial and legislative capacities. Reeve's all but forgotten school played a strong part in the early life of the nation.

Appointed Judge in 1798

Reeve erected the little law building at the side of his home in 1784. Heretofore it had been the custom for a law student to study in the offices of a practicing lawyer, but Reeve began to lecture to his students, speaking in a shrill whisper, for he had an affection of the throat, with the students scribbling hasty notes on his discourses. The lectures were in the morning and the students passed the afternoon studying and copying their notes into books. In order that they might have some semblance of practice, the students participated in moot courts, where two took a part on each side, with others acting as judges. Judge Reeve reviewed their decisions, pointing out the discrepancies in argument and legal doctrine.

Having been appointed judge of the Superior Court in May, 1798, Reeve saw the need of a partner in the school and he chose James Gould, a Yale

graduate in the class of 1791, as his assistant.

For twenty-two years Reeve and Gould conducted the law school jointly. For purposes of teaching they divided the law into forty-eight titles. Reeve was particularly interested in the law of domestic relations—Baron and Femme—and he published an authoritative work on it in 1816. Judge Gould specialized in the law of pleading, molding his ideas into a treatise which was a legal guide for many years.

Retired in 1820

Judge Reeve retired in 1820, leaving Gould in charge of the school. Associated with Reeve in the life of Litchfield was Lyman Beecher, "the father of more brains than any other man in America"—Henry Ward Beecher and Harriet Beecher Stowe, who were both born in the family mansion on North Street. Beecher was pastor of the Litchfield Congregational Church for sixteen years.

Eulogizing Reeve at his funeral in 1823, Dr. Beecher said, "At a moment of greatest dismay, when Washington fled with his handful of troops through the Jerseys, and orders came from New England to turn out en masse and make a diversion to save him, Judge Reeve was among the most ardent to incite the universal movement, and actually went in the capacity as an officer to the vicinity of New York, where the news met them of the victories of Trenton and Princeton, and once more Washington and the country were delivered."

Reeve was gone, but his pioneering work in the instruction of jurisprudence lived long after him through the distinguished services of his students.

Gould continued with the school for

ten years. Meanwhile, he had married Sally Tracy, the eldest daughter of one of Reeve's first students, Uriah Tracy, then recently appointed a United States Senator from Connecticut. Portraits of James Gould and Sally Tracy, painted on glass, now hang in the American wing of the Metropolitan Museum. Coming from Yale, Gould brought with him certain collegiate practices. He was dignified and polished, and his lectures have been described as finished essays on legal practice. He inaugurated a school roster, from which the students later compiled the first catalogue of the school. This register now contains 794 names for the period from 1798 to 1833. These, with some 200 before the time of the roster, show more than 1,000 students attended the school in the fifty years of its existence. These students came from as far as Louisiana and Missouri.

Largest Law School for Ten Years

Other law schools were now functioning—Harvard, Yale and William and Mary. Yet the Litchfield school continued as the largest in the country. In the ten-year period from 1820 to 1830 Harvard gave forty-three Bachelor of Law degrees, while 284 were given at Litchfield.

Judge Gould associated with him in his conduct of the school Jabez W. Huntington, later a Senator from Connecticut, and Origen B. Seymour, later Chief Justice of the Supreme Court of Connecticut. But in 1833, when Gould's health had become impaired, the school was closed.

The Reeve property was acquired by Mr. Lewis B. Woodruff, of New York, after the death of Reeve's widow. It continued in the family, being known as the Woodruff mansion until the

death of Lewis B. Woodruff, a grandson, in 1927, when it passed into possession of Yale University. In 1929 it was acquired by the Litchfield Historical Society and restored to its original condition, and now holds memorials of its history in furniture, engravings and books. Meanwhile, the Little Law School building had been moved to another part of the village. It was finally brought back to its original place and dedicated a year ago as a public shrine by the Bar of the United States.

Litchfield, bought from the colony of Connecticut in 1718 for £300, settled in 1720 with a surrounding palisade to ward off Indian attacks, was in Revolutionary times, as now, a village with outstanding examples of Colonial homes. Besides the Reeve, Beecher and Wolcott homes is the mansion of Colonel Benjamin Tallmadge. He served prominently in the Continental Army, commanding troops at Morristown, N. J., and in the capture of Andre. At the close of the war he purchased a house in Litchfield and resided there until his death in 1833. His home is now occupied by his granddaughter, Mrs. E. N. Vanderpoel, who is serving on the committee in preparation for the forthcoming Washington Bicentennial celebration.

Find Bones 100,000 Years Old

BUDAPEST, Aug. 6 (AP).—Workmen who had lost their jobs with a scientific expedition were so certain that discoveries could be made in a certain cave of the Hor Valley in the Bukk Mountains that they persuaded an official to advance them \$50. They found human bones which experts of the Hungarian National Museum say are between 100,000 and 120,000 years old.



Restored structure at Litchfield, Conn., where Washington bicentennial celebration will be held
August 27

within our own country. On that we can count, and it is a good deal. It is enough to account, sooner or later, for a fair-sized boom. But attainment of our real capacity, achievement of permanent new growth and a state of business higher than ever before, must wait a normal condition in international trade. That may be a considerable time in coming.

By the series of business storms that have taken place in Europe, Asia, South America and elsewhere, extremely serious impediments to international trade have been created. The changes in the purchasing value of many currencies are alone enough to constitute dams in the channels of trade. The debts due our government from European governments are an obstacle. The tariffs which one scared country after another has set up will make normal international trade impossible so long as they last.

The overcoming of these obstacles will take a long time; and until they are straightened out the United States, and every other country, will fall short of its full potential prosperity.

There have been serious lessons in this depression that the country should take to heart and long remember. Some things have happened that should never be repeated. The wave of failures of banks has been unforgivable.

nearly all instances wet delegates had been elected to the county conventions. It was then a mere formality to send wet delegates from the counties to the state convention, which adopted a resolution declaring for a resubmission referendum. The Texas delegation to Chicago voted for outright repeal of the Eighteenth Amendment, and, according to dry leaders, threw Garner over, so far as the Presidency was concerned, and cast their votes for Franklin D. Roosevelt.

Effect on Party Course Unknown

What effect that resubmission result will have on the party's future course in this state is not yet apparent. The question was not an issue in any campaign for Congress prior to the primaries on July 23, and it is not being discussed by the candidates in the run-off contests, which will be settled August 27.

Only three members of the state's present Congressional delegation are avowed wets and two of these were renominated in the first primaries, and the third, Richard Kleberg, has a wet opposing him in the run-off in the San Antonio district. Garner, who was renominated for Congress in the 15th District, favors repeal. It is unlikely that any of the Texas dry members of Congress elected in November will consider the result of the resubmission referendum as binding on them.

tive Charles R. Crisp are running for the unexpired term of the late Senator William J. Harris.

Georgia will elect two United States Senators this year, but Walter F. George, whose term expires next March, has no opposition for the Democratic nomination. J. W. Arnold, of Athens, Republican National Committeeman, will oppose him in the general election.

Major John S. Cohen is serving temporarily as Senator Harris's successor, but his appointment will expire when the election is held, and he is not seeking the nomination.

Crisp Organizes Campaign

Representative Crisp has a well organized group at work in his behalf. Governor Russell has been busy delivering commencement addresses at colleges throughout the state. The peace officers of the state met in Savannah recently, and the Governor was present. He also attended the convention of the Georgia Bar Association at Warm Springs.

Recently the Governor and the Congressman have indulged in some sharp passages that have brought the campaign prominently before the people. The Congressman began it with a state-wide radio program in which he vigorously assailed the "long public job-holding" record

Atlanta List Misleading

While these are the official addresses of the candidates as given out by the secretary of the state executive committee, several of those credited to Atlanta are not citizens of this city. Edwards is a resident of Valdosta. He is a representative in the General Assembly and probably in that way was assigned to Atlanta. Talmadge is a legal resident of Telfair County, but lives in Atlanta because he is Secretary of Agriculture. Kelley is an Assistant Attorney General, but his home is in Gwinnett County. Holder lives in Jackson County.

Kelley is regarded by some as the Russell "heir apparent." Holder has run for Governor several times without success. He is a former chairman of the State Highway Board.

Summers's candidacy is in the nature of a protest against the way he says he was treated by some of the supporters of Franklin D. Roosevelt when he was busy lining up the state for the New York Governor in his race for the Presidential nomination.

In the Senatorial race Crisp has the support of "The Macon Telegraph," "The Atlanta Constitution," "The Savannah Morning News," "The Albany Herald" and several other daily papers. "The Atlanta Journal" has taken no editorial stand on the Senatorship but is expected to support Russell.

To press its case the commission has appointed Huston Thompson, former Trade Commission chairman, as special counsel. Whether an appeal will be taken from the recent adverse decision of the Norfolk court is expected to be decided within a few weeks. This decision, however, is not regarded as conclusive by the government, which views it as a step that must be disposed of in preliminary maneuverings before the real issue can be settled.

In one form or another, the New River case has been up for several years. It was handed along to this commission by the old commission of cabinet officers that passed out of existence in 1930 without a definite decision. Consideration of the problem by the present independent commission led to throwing it into the courts for settlement.

135 Plaintiffs in Land Suit

LAREDO, Tex., Aug. 6. (AP).—An old Mexican land grant case recently settled in district court here, involving almost 11,000 acres, had 135 plaintiffs and intervenors and thirty-five defendants.

Auction Sales



MID-SUMMER SALE OF Beautiful Furnishings

AT THE
Wise Auction Galleries

428 Columbus Ave. at 81st St.

BENJ. S. WISE, Auct'r
SELLS AT PUBLIC AUCTION

Tues., Aug. 9, 10:30 A.M.

also Wednesday & Thursday, 2 P. M.

Goods removed from Rockville Centre & Strang's Storage Warehouse

Collection of Valuable Books,

BEDROOM and DINING SUITES,

Beautiful Living Room Furniture

IN SUITES and ODD PIECES,

China, Glassware, Bric-a-Brac, etc.

Collection ORIENTAL RUGS, large

and small sizes, sold Wed., 5 P. M.

Exhibition Tom'w (Mon.) All Day

CONTINUATION

Estate Sale of

Choice Furnishing

and

Works of Art

at Public Auction

Thursday & Friday, Aug. 11th & 12th

88 University Place

Between 11th & 12th Sts.

exhibition this Wednesday

Arthur Kaliski, Auctioneer

THE FAMILY CIRCLE

by

André Maurois

is

reviewed

by

Virgilia Peterson Ross

in

"BOOKS"

NEW YORK

HERALD TRIBUNE

TODAY

Gains Likely in House To Be Elected This Fall

indicative of anti-prohibition gains, despite efforts of the dries to minimize it.

The Texas result has put Senator Morris Sheppard, sponsor for the Eighteenth Amendment in the Senate, in an embarrassing situation. Since the referendum Representatives Clay S. Briggs, of Galveston, and Daniel E. Garrett, of Houston, both dries, have announced they would abide by the referendum. Representative R. Ewing Thomason, of El Paso, previously dry, announced before the primaries that he would support resubmission.

In Alabama Senator Hugo L. Black, who is dry, came out for resubmission before he was renominated. Florida has felt the anti-prohibition movement strongly as indicated not only by the defeat of Representative Ruth Bryan Owen by Mark Wilcox, an outright repeal advocate, but by other developments indicating practically a complete turnover of the Florida delegation from dry to wet. The veteran Senator Duncan U. Fletcher, who is up for re-election this year, is a new recruit to resubmission.

Other Recruits to Resubmission

Other recruits in the list up for re-election include Senator Alben W. Barkley, Democrat, of Kentucky; James F. Davis, Republican, of Pennsylvania; Carl Hayden, Democrat, of Arizona; Ellison D. Smith, Democrat, of South Carolina; Frederick Steiwer, Republican, of Oregon; Samuel M. Shortridge, Republican, of California, and James E. Watson, Republican, of Indiana.

Senator Smith W. Brookhart, Republican, of Iowa, perhaps the most intense dry in the Senate, has been beaten for renomination, and there is no doubt this was partly due to the feeling of wet Republicans against him. Henry Field, seller of seeds and farm supplies, who defeated him, is known as a dry, but did not make that the chief feature of his campaign.

Representative John J. McSwain, of South Carolina, recently announced that the entire delegation from his state in the House would support the Democratic repeal plank. This marks a shift of great value to the resubmissionists.

Need Unity on Amendment

While there is a distinction in the platform sense between support of resubmission and repeal, the resubmissionists in the new Congress will include outright repealists and all others willing to submit a new liquor amendment to the states. If they are to get anywhere it will be necessary to sink their differences on details, get together on an amendment and unitedly vote for it.

In West Virginia all the Democratic nominees for the House are standing on the Democratic platform. Inasmuch as that state is showing a strong tendency to go Democratic this fall, their stand has a considerable bearing on the outlook for anti-prohibition gains. The defeat of Representative Willis C. Hawley, Republican, of Oregon, former chairman of Ways and

Means and a dry, by James W. Mott, a resubmissionist, is accounted a gain by the wets.

The primary developments in Ohio have encouraged the hopes of the wets to control the next House. Wet leaders predict that not more than eight dries will be in the next House from Ohio, long the stronghold of the Anti-Saloon League. While it is generally expected Senator Robert J. Bulkley, Democrat and wet, will be re-elected, his Republican opponent, Gilbert Bettman, also is wet, and from the prohibition standpoint it makes little difference who wins.

In some respects recent developments in Indiana are more striking than in any other Northern state. The two major parties in that state, just before the national conventions, declared vigorously for a change in prohibition. The movement for repeal of the Wright state enforcement act also has great strength. The Indiana delegation in the next House will apparently be wet with few exceptions, and Senator Watson, as already indicated, is now for resubmission.

Indiana "Revolution" Surprising

When it is considered that Indiana for years was looked on as a Gibraltar of the rigid dries, the revolution in sentiment there is astonishing. And, while many political observers insist that a huge bone dry vote will be rolled up in Indiana, as in some other states supposed to have shifted to the wets, it is evident that the ablest politicians of the two major parties in the

state believe that the people have turned against the Eighteenth Amendment.

Other instances arising from the primaries and conventions might be given to show that a damp wind is blowing. At the same time it should be borne in mind that the dries can suffer large losses and still hold a majority in one or both houses and that the wets can make big gains and not reach the two-thirds goal. The road to submission of a new amendment, even from the standpoint of the most optimistic wet chiefs, is still long and rough.

Not the least evidence of national unrest over prohibition is to be found in the fact that referenda are to be held this fall in about a dozen states. In general the purpose is to test sentiment on repeal of the Eighteenth Amendment or on state enforcement acts or both. Texas had its referendum on repeal July 23. States which will have votes on repeal of the Eighteenth Amendment in November include Louisiana, Wyoming and Connecticut. States which will vote in November on repeal of state enforcement acts include Louisiana, California, Oregon, Michigan, Washington, Colorado, Arizona, North Dakota and New Jersey.

Rhode Island, Massachusetts, New York, Wisconsin, Montana and Nevada have repealed their state enforcement acts. The Illinois Legislature passed a repeal measure in 1930, but it was vetoed by Governor Emmerson.

Litchfield
Minutes of the

Lectures of
Tapping Reeve Esquire
Taken in his Office

by
Robt Fairchild
Student
D. 1794

e 1. Continuation of a Lecture On Contracts

Of such defence as at Law may be made
against Contracts, whether Parol, re-
duced at length to writing & sealed, or
reduced to writing engaging to pay a
sum of Money or perform a duty which
on the face of them import a value
received. and 1st

Of Parol Contracts

1st Coverture may be plead

2nd Infancy

3rd Duress

4th Usury

5th An illegal consideration stating its illegality

6th Payment & performance

7th Discharge before breach

8th A release since the breach

9th Statute of Limitations

2.

Contracts

10th That it was impossible stating the impossibility

11th That a security of a higher nature was given
N.B. If those matters appear upon the face of the
contract as stated in the declaration it is a good
general rule that such declaration may be
demurred to - to this, the Stat. of Limitat^{ns} is an
exception - it must be plead

12th Accord & Satisfaction -

Accord & Satisfaction is not only a de-
fence in case of an Assumpsit but in most other
suits in the personalty - in all where nothing but
damages are recoverable - not applicable to
real property (not pleadable to a demand
due already by bond, bill &c - but if the accord
is executed before ^{day of} payment it is good -

* Where.
Is this true?
Not in this
country -

No satisfactory reason can be assigned why it
should not be a bar in case of a Bond as well
as in other contracts. The origin of this practice
was this - Bonds were taken with penalties &
when these were forfeited a man would not
choose to pay them up, but only the original
debt, therefore after the penalty was forfeited

Rep. 44.
Pro. Lac.

650. Courts would not ^{suffer} accord & Satisfaction to be a bar
to the debt, tho' before it was due ^{that} it would be sufficient

Contracts

Accord & Satisfaction may not be plead where there has been no consideration - As if a man should take away Cattle & afterwards offer them to the owner & prove that he accepted them, this would not be a sufficient bar as no satisfaction was made for the injury. There must be some consideration & that of value in a pecuniary view - no matter as to the quantum - a pepper corn is sufficient. A less sum of money received for a greater is not a good plea - As if a man should receive 5 £ in satisfaction of 10 £ This would not do - for the Court knows that 5 is not 10 - But if it had been a walnut in satisfaction of the 10 £, this would be sufficient for How could a Court possibly tell but ^{what} a wal.

Contracts

- not is worth 10£ What presumption would
it be in them to decide whether or not a bar-
ley-corn is worth a million pounds! Asking
 pardon is not a sufficient consideration. but
 why ^{might} it not be more genuine satisfaction to a
 man who is injured to receive the pardon of
 the offender than to receive 2^d - As if one man
~~should~~ ^{should} assault another & afterwards repent &
 offer ^{to ask} pardon in satisfaction of the injury,
 should ~~he~~ ^{he} be more satisfied & ~~the injured~~ ^{the injured}
 party to receive ~~it~~ ^{it} than a ~~pay~~ ^{pay}
~~of 20£~~ ^{of 20£} yet in the eye of law the former
 is no consideration, while the latter is abun-
 dantly sufficient. It is pretty evident the
 126
 Coliz. 193. original meaning of the Law was that the
 9 Rep. 79. consideration should be of equal value with
 C. Little the debt, & the compensation equal to the in-
 212- jury. It is true that it would be impossible
 for the Court always to distinguish with ac-
 curacy between the debt & consideration. As
 if a man sold a horse for ^{a note of} 20£ should receive
 19£ for a horse ^{supposed to be} worth 20£ - the pay^t of the

It is sufficient consideration for the horse - it would be difficult & indeed impossible for the Court to determine that the horse was worth 20£ or 19£ as the ideas of men are so various respecting the value of horses. In matters of such trifling difference we should ^{not} expect them to decide upon the value of articles; but this can be no reason why they should descend into such ridiculous absurdity as to say that a pepper corn is a sufficient satisfaction where 1000£ would be ~~altogether~~ insufficient.

The consideration must also be of legal value in order to be a good plea - an equitable value is insufficient. A release of redemption in equity is considered as no satisfaction, tho' it were really worth a million*.

The accord must also be certain & executed by the parties. A tender will not do tho' it were more than sufficient. Cro. Eliz 193. Marge 573. 9 Rep. 80.

S.B. * ~~Afterwards in the case of the release of redemption~~ There is a decision in Lord Raymond 662 that ^{the release of} an equity of redemption is a sufficient ^{consideration to support and execution of} satisfaction.

Lecture 2nd § 13th. An award of arbitrators is a defence against contracts.

An award is a judgment rendered by persons chosen by parties, concerning some question in dispute. When an award has been rendered legally, it is a good plea against almost all claims as well as those of a Parol nature, which last we have been particularly contemplating. - There are some ^{matters} ~~cases~~ where which cannot be left to arbitration. Award therefore in these instances would be altogether nugatory - Criminal & matrimonial affairs & other matters of a public nature are beyond the jurisdiction of arbitrators; but almost all disputes among individuals are subject to arbitration. The titles of land are arbitrable, but ^{in Eng.} no title can by any means be given by the award; the bonds given to abide by it are forfeited by non-compliance. In England bonds are absolutely necessary in arbitrations concerning real property - for as no title can be conveyed by the award, such

Contracts

award would be perfectly nugatory unless bonds are entered into to abide it, so that rather than forfeit them the party against whom the award was rendered would peaceably wave his title. The reason why no title can thus be given is because livery of seisin is necessary & arbitrators cannot be supposed to do this - But might it not do to deliver up the deeds to the arbitrators, as an escrow & suffer them to give the title to whom they please? This would by no means do, for it would be a temporary suspension of all right to the land & break in upon the sacred maxim of the English law that no fee can commence ^{on a contingency} in futuro. In this respect the English Law differs from ours - as we have no such disgraceful maxim, the deeds may ^{here} be delivered up to arbitrators, & they will convey the land to ^{whichever party} ~~whichever~~ they think proper.

Debts certain due upon bond ^{bills or notes} are arbitrable & if the parties choose they may acquiesce in the award, but such award is in reality no defence against an action founded upon them, yet if

Bonds are given & the award not complied
 with the bonds are forfeited, but if the ground
 Obo. 43 of recovery was not the deed only, but by rea-
 son of some subsequent wrong an award is
 Gro. Sac. 49. a good defence. An award is a good defence
 against a bond, if the award was before the
 bond was due. Payment of the condition is
 always a good defence. But where there is
 no condition & the debt grows by deed itself
 without any subsequent wrong, as in a
 single bill, an award is no plea. In Con-
 necticut there is no difference between bond,
 bills & other writings. ^{The fact of paym't proved is sufficient} All other matters
 beside the exceptions already made, are ar-
 bitrable. All matters of controversy whe-
 ther contracts or torts are not only arbitra-
 ble but an award is a defence against any
 action bro't, nor is it necessary to its va-
 lidity that there should be any writing
 respecting this matter. The powers of arbi-
 trators are equitable as well as legal, for
 the remedy they give may be specific or
 in damages. It is commonly the case that

Contracts

The award is in writing but whether in writing or not, it is as operative as a judgment of Court. As if there is a dispute concerning a horse & it is settled by arbitrators who owns him, the property of the horse is completely vested in him. Where there is a submission by parol & a sum awarded, if the debt wishes to make use of it as a defence against an action brought, he must plead the award & performance, for if he has not performed, the award is no bar to the Plf's recovery on the original cause of action.

If a time is limited for performance, in the interim no action can be sustained upon the original cause of action. after the time limited & it is not performed, the Plf has his election to bring his action of debt to recover the sum or an action founded upon the Assumpsit contained in the submission. if it be to do as a collateral act as to deliver an horse &c his remedy is an action on the case. If the award is specific as that such an horse is the property of A. A may maintain trover. All submission

Contracts

Book 31. now whether ^{by} parol or writing are revocable

If it be by parol & the submission is revoked no action lies - if by bond the bond is forfeited - We have a practice of chancery down bonds to equitable costs. ^{They are not more about the legal costs than} Where the submission is by bond, note or covenant if the Deft wishes to use the ^{award} ~~award~~ by way of defence, he may whether he has performed or not, for his bond is forfeited and this is a security of an higher nature than the original cause of action. If the Plf. wants his remedy it is upon the instrument! If upon a bond the penalty will be charged down to the sum of the note. If on note the practice is to endorse down the note, the done by the arbitrators, or if the note is not endorsed, you may plead that it was an arbitration note & shew the award which will be the rule of damages on the note. - If on covenant that is to pay the sum of the award, the Plf must then set out the award &c. Submission by rule of Court is where arbitrators are agreed upon by the parties & appointed by the Court - There are

Contracts

in some respects different from other Submissions. The authority of the Arbitrators may be to settle any ^{one} controversy or all the controversies between the parties. These submissions both in Eng. & ^{France.} America depend wholly upon Statutes. The Eng. mode of enforcing judgments is different from ours. If either party will not carry into execution the award ~~his~~ ^{his} ~~part~~ ^{part} ~~age~~ it is considered as a contempt of the Court & they will issue an attachment against him & confine his person till he will comply. The Plt may bring his action upon the award. If, however, the person awarded against, dies the remedy by attachment fails. The remedy under our Stat. is much preferable to the English. An execution is issued for the sum awarded which precludes any necessity for an attachment or any other action. If the Submission should be revoked here, it would be a contempt of the Court - we cannot tell however what a Court would do in this case for there never was an instance of such a revocation. — —

Contracts.

An award that a man shall make satisfaction any way, by ^{asking} pardon for the injury or in any other method is a sufficient defence.

Lecture 3rd

Who may submit to Arbitrations

It is a general rule that all persons not disqualified from making contracts may submit their controversies to arbitration. Executors & Trustees may submit & as it respects them the award is binding; but those for whom they submit the controversy are not bound by the award. It is therefore advisable for Executors & Trustees not to submit to arbitration controversies, which concern the persons for whom they are employed; Yet if those who employ them are satisfied with the award, it is a sufficient defence for the executors. If they make any contract & this contract is not prejudicial to the interest of the persons employing them it is binding upon those persons. But if the executor makes a bargain that will injure the estate of the heir, the heir is not bound by it. - Infants are allowed to

Contracts

Submit to arbitration - tho' they have their election either to abide by the award or avoid it, this election is not reciprocal between infants & adults, the adult being bound ^{at all events.} The husband may submit any matter which he is ~~entitled~~ entitled to in right of his wife, as bonds, Leases &c, but if it relates to the inheritance, she must be made a party. Lunatics &c cannot submit to arbitration on the ground that they are incapable of contracting. - Persons may sometimes submit for strangers, but provided such strangers do not comply with the award, the bonds are forfeited by him who undertakes to represent the stranger. - When a submission is made by an attorney, the award is as binding as tho' the employer himself had ~~done~~ submitted. It has been a question among Merchants whether one Partner may submit a controversy for his co-partner - it is now determined that he cannot, unless this power be one of

Contracts

the articles of agreement. But the Partner who submits, is at any rate bound by the award, & on refusal to perform it forfeits his bond. When many are concerned cases may happen that the act of one is consid^d the act of all. As when several have committed some wrong & one of them submits to arbitration & by the award is to pay a certain sum. The person injured is here supposed to have obtained a proper compensation for his injury & it would be unreasonable that he should obtain separate compensations from every one that was concerned in a joint act. If A. bails a horse to B. which is taken away by C. and the two latter submit to ~~the~~ the affair A. is bound by this award as it respects the trespasser C., but has a remedy against B. - Here a Question arises. Can the Bailor bring an action against the trespasser after ^{such} the submission, but before the a

There seems to be no authority in point; but it is apprehended that the submission is no bar, for altho' one action by the Bailie, excludes the Bailor from another action against the Trespasser, yet a submission has not that effect till the award be made.

Who may Arbitrate?

An arbitrator must be a man of common sense - if he is a person destitute of understanding either party may take advantage of this circumstance to nullify the award. An infant or feme covert can not be arbitrators. So the disgrace of ~~the~~ ^{English law books} ~~modern~~ ^{there is a Question in Books} whether a man may arbitrate his own case - as ridiculous as the idea is, this

18.41. principle is supported by an authority in ^{Modern} ~~Hardship~~, but contradicted by others - ^{Hardship}

How may an award be set aside?

If an award be by parol & an action is founded on the assumption contained in the submission, non assumpsit may be plead, & the action may

Contracts

of the award be given in evidence. - If the action be brought upon the award for a sum certain, the Deft must plead no award & give in evidence the corruptness of it. - If the action be brought on the bond, the deft, must again plead no award &c. The Plf, in such cases does not close by saying there was an award but replies over stating the award & proving a breach. -

An award may be corrupt three ways particularly 1st by being founded upon matters not contained in the submission. - 2nd by falling short of what is contained in the submission & 3rd by exceeding it. - If corruption in the arbitrators can be proved, the award is destroyed, or if it is clear that there was great partiality. - An award may also be set aside by a mistake of facts - but Courts seldom meddle with awards of the last kind. - The rule of Courts of Law is not to look back into the principles of the arbitration, it being generally presumed that arbitrators have done justice. -

Contracts.

If however the mistake is founded upon the false principles which they lay down & by which they acknowledge, they were influenced, a Court of Law or Equity will interfere. Where there is a mistake in point of fact Chancery will always interfere & suffer an enquiry into the merits of the case that the mistake may be pointed out - But if the mistake is upon a question of Law - neither a Court of Chancery or Law will interfere. The admission of illegal testimony may set aside an award founded on this testimony. New-discovered testimony is also another ground for setting aside an award. This by application to Chancery - The Court will only set aside the award so as to leave the parties open to a second trial, either to a submission to arbitrators, or to an action at Law. If illegal testimony is admitted in a submission by rule of Court the ground in Chancery is a ground in Law. & a Court of Law in such case will always interfere. If the award be drawn up in the nature of

a special verdict stating the whole proceedings. If it appears upon the face of it not to warrant a judgment, the Court will set it aside. This effected by a remonstrance. An award must be certain, else it is void.

As if it was awarded that the Def^t should charge give security to pay the Pl^f an annual sum of 1024. This void because no security was mentioned specified - If it should be awarded that A should release all that B owed him, such award would be deficient on account of its uncertainty. But where the Court can make it certain then will as where it was awarded that the Def^t should pay all the costs without mentioning legal or equitable this was held to be certain, on a Clause in Blackstone which says, where cost is mentioned without a qualification it means legal costs. An award must be final i.e. It must be so that no action can possibly be founded on the original claim. As where it was awarded that all manner of proceedings depending at Law should be no further prosecuted

Contracts

This was not final; it staying only proceedings then depending, — it ought to be all future also. An award must be possible to be performed. The same rule obtains in this case as in contracts. — It must be lawful, for no award is permitted to counteract the Law — An award must be reasonable, — if it is that one man shall serve another it is not good; if it be that one shall procure a thing out of ^{his} power, or that he shall cause a stranger to do a certain act, the award will be good in neither case, unless in the latter, he has the means to compel the stranger to do the act. — Awards must be mutual, — in the case before mentioned where the Deft. was to give up all proceedings, this was not mutual, because nothing was awarded to be done on the part of the Plf. — The controversies must all be settled at one time — & must be beneficial to the party to whom it was made, ^{in whole favor the award was made.}

50. If the submission be of all controversies & it is awarded respecting one only. This according to the authorities is a good award, for it shall be presumed that they acted according to the submission, unless the contrary can be proved.

Contracts

If the award is to release all demands up to the date of the award, it is within the submission, for no demands shall be incurred between the submission & the award. if indeed any are shown the award may be affected.

If it be awarded that A. ^{owes} ~~pay~~ B. 20 £ & instead of paying the cash, he shall deliver B. a certain horse. Some authorities suppose the arbitrators have gone out of their jurisdiction, but it is now settled that such an award is good; for it is only awarding a collateral thing for a sum of money which they have a right to do.

Some are of opinion that where several controversies are submitted, & the award is void in part, it is wholly void. But it is apprehended this rule is not universal & that no

Recue thing conclusive can be drawn from what Bacon says on this subject. The true rule as drawn from the authorities may be founded on this universal principle. "That arbitrators may determine every controversy submitted to them either severally or in gross." If therefore they are awarded in gross, & one part is void the whole transaction is void but if severally,

Contracts

the badness of one cannot effect the rest. —

If the arbitrator award as to a particular fact out of the submission, which fact is so immaterial as not to shake the validity of the award this circumstance cannot set aside the award. — As where a controversy respecting land was submitted, and it was awarded that one party should convey & that his son should join in the conveyance, this award was not consid^d corrupt: But if ~~a fact~~ it is awarded as to a particular matter out of the submission & the award would not be valid without this matter, or even if ^{it} affects the validity of the award in the least, such award may be avoided. —

1st Defence against contracts. Tender of Tender

A tender is an offer to fulfil an engagement which a person is obliged to perform. It is a defence against all claims where the debt or duty due can be so far ascertained that a person may know how much to tender. It is also a defence against bonds certain due. There is no such exception relative to bonds, bills &c as there was in paying ^{accord & satisfaction,} arbitrument &c. The reason why

Contracts

there is no such distinction; is that there is no such thing as making ^{tender} till the debt or duty is due - whereas ~~in~~ accord & satisfaction must be made before the debt ^{on bond} is due &c see page 2nd

There is a difference between our practice & the English as it respects a tender - tho' there does not appear to be any difference in principle - Here a tender may be made after a suit is instituted if it can be ascertained what the costs are - in such case all costs must be tendered as well as the original debt - In Eng Land if a suit is instituted the person who means to tender must bring in his money by rule of Court - Tender is no plea where the debt sounds only in damages - for as persons are of various opinions respecting such matters damages cannot be sufficiently ascertained to ~~know~~ how much to tender - There are particular Statutes in Eng. authorizing persons in particular cases to tender where the sum is doubtful & cannot be ascertained - We have no such Statutes in Con. regulating this subject. our law upon tender depends altogether upon Com. Law. In case of a tender

Contracts

of money to redeem any pledge, the pledge vests in the tenderer, all right to it having gone from the pawnee, on the moment of the tender. The same as to a mortgage, but in both instances the money is vested in the tenderer. A case may happen where the mortgage will vest in the tenderer, on his making tender, without ever being liable to paying the money to the mortgagee. As if a man should make a voluntary mortgage to be given up upon his paying the mortgage 100£, if he should tender the 100£ & the mortgagee would not accept, the land vests in the mortgagor without ever being liable to pay the 100£ - for no debt or duty was due it having been a gratuitous grant -

In case of a bond with a condition, a tender of the sum contained in the condition is a complete defense against the bond. This depends upon the nature of a bond. A bond must always be sued upon the penalty & just penalty cannot be forfeited till the condition is ^{fails} failed to be performed. A bond given by A. to B. with a penalty of 15£ to be incurred on the failure of A's paying to B. 5£ at such a day, only signifies that A. owes

Reve B. 5 £ the sum contained in the condition—
if therefore this 5 £ is rendered the Bond as pen-
alty is evidently discharged, as much as if the
5 £ had been accepted—As the sum is thus
rendered the tenderor becomes bailor to the cred-
itor & no action ought ^{to} be sustained upon the
Bond. The action should be an action of indebit-
assump. This a new doctrine contrary to the
generally received opinion, but appears to be
founded in reason, & the principles may be gathered from the

Effect of tending of money upon ordinary debts.

If the Debtor does all his duty, tenders the
money fairly, he suffers no more inconvenience
it operates for him just as favorably as tho'
he had paid the debt. He is only to come into
Court & plead "that he has tendered, has ever
been ready to pay & is now ready." No in-
terest is to be paid after tender, till demanded.
The tenderor may ^{lose} the benefit of his tendering
if he is not always ready to pay on demand.
If the creditor after tending makes a reasonable
demand, & the debtor refuses to pay the money
he is left in the same situation as if he had
never tendered, only interest would be struck

Contracts

out from the time of the tender to the time of the demand. This demand must always be reasonable; it must generally be made when the debtor, or (as we should call him) the bailee, is at home, & if away from home if it can be proved that he has the money, this would be sufficient.

Operation of Tender upon some collateral matter, not money.

Here the Debtor has nothing to do but tender, he is not obliged to keep the things tendered. As Cattle & other burdensome ~~for~~ articles, which are either expensive to keep inconvenient to keep. The Debt. need only come into Court & plead simply 'That he has tendered.' The tenderor has no further claim upon the article tendered, but it immediately vests in the tenderer, & if tenderor takes care of the property & will not deliver it up on demand from the tenderer, he is liable to an action of trover. Tho' if the article was expensive to keep the tenderor has a lien upon it, till this expense is paid. As if Cattle are tendered & afterwards fed by tenderor this must be paid before the tenderer can take them.

Have

When cattle or money are tendered; the true idea is, "that they both vest in the tenderer." This is the only principle by which authorities can be reconciled & the only ^{one} which is reconcilable with reason. As to collateral articles it is generally & universally allowed that they vest in the tenderer - But that money thus vests in the tenderer is far from being generally agreed. The reason why ^{it} is said not to vest in the tenderer is "That the action is after tender bro't upon the note" which could not be the case if the tenderer was only bailee -

This objection is easily obviated - The action is bro't upon the note, in order that the note may be bro't up to view & be lodged in the files of the Court, so that after the debt is paid it might ^{not} rise up & be again recovered - for it is easy to see that if the action was bro't against the tenderer as bailee, the note might be kept secret and another demand made for the same debt. Suppose a debtor has tendered his debt & afterwards his house is burnt ^{& the money with it}. Who shall be the loser? on all hands agreed that the creditor, but what can be more nonsensical & absurd than to say the tenderer shall be loser, if the money is

Contracts

not vest in him. The tenderor in whose house it was burnt does not own it for if he did, he would be the looser, & if the tenderer does not own it, there is no loss in the case. Upon this principle the money, from the time of the tender to the time of the demand, would undergo a temporary suspension of its existence, & if lost within this time, nobody would be the looser, & a thief ought not to be apprehended for stealing ^{during this period} it. The fact is that in both instances of money & collateral articles, they when tendered they vest in the tenderer. To suppose the contrary in case of money would do great injustice if the money was lost by accident, the tenderor being only bailor to the tenderer, liable indeed to account for the money in a suit upon the note; but this for the benefit of the tenderor that the note may not run up hereafter. The law is made in favor of the tenderor & is much the most unfavorable to the tenderer as being most blameable in not receiving the money when tendered. The very fact that the tenderer has a right to demand the money clearly shews that the tenderor is only bailor. If the note can be proved to be lost, or out

of the way, in any such case an action of indebit. assump. lies, which clearly ^{is in favor of} proves the principle before laid down "that the tenderor is merely a bailee to the tendorree".

Where a Creditor is the cause of the tender not being made, if there is any loss happens in consequence of his not being ready to receive it, he is to be the loser, & not the debtor - As if the creditor is out of the Kingdom & has no fixed home & has left no agent with whom the money might be left, in such case the debtor ~~Hardgrove~~ has only to declare before evidence that he is ready to pay the debt & wishes to do it - This is just the same in Law, as tho he had tendered it. If a man cannot tender to take up a mortgage because the mortgagee was not to be found he may re-enter, as if he had made payment. If there is an agent it is necessary to tender to him. — This principle of the creditors being inaccessible applies to all kinds of debts. The creditor is to bear any loss of by depreciation &c, & any other accidental loss in consequence of his "inaccessibility".

Here naturally arises the subject of de-falcating the sums due to refugees before the late war. — In some States Statutes were

Contracts

made to defalcate such debts. It is said by some that those Statutes were in violation of the Treaty of Peace if ~~so~~ they ^{were} ~~are~~ of consequence repealed, for no Stat. can be made contrary to treaties. It is apprehended that these Statutes may be reconciled with & are perfectly consistent with the Treaty, - on the principles before laid down - The Treaty says they the Tories should be secured "the whole of their just debts." They became inaccessible to their debtors, so that when the money was good, they were not here to receive it - Suppose the loss had happened any other way besides by depreciation, who would have borne it? The creditor certainly. It would be just as ^{un-}reasonable for the debtor to bear the loss in this instance, as it would for the faithful tenderer to bear the loss of that ^{money} which he had tendered, but which unfortunately was burnt up with his house. The loss had happened before the Treaty of Peace & ^{was} ~~could~~ not be repaired by the Treaty. We may therefore fairly conclude that just debts might be defalcated, & the Tories notwithstanding be secured "The

whole of their just debts."

Lecture 5th The Authorities on first sight would seem to contradict the Principles before mentioned; for they say that in cumbrous articles, tender discharges the duty completely - but that the tender ^{of money} does not discharge all duty. - This is very true & upon examination will be found to agree perfectly with the ideas before suggested - In case of money the duty that remains after the tender is simply the duty of a bailee & the tenderer of cumbrous articles may also impose upon himself the same duty, if he pleases to take care of them after tender which is frequently the case.

Of Tender in case of Book-debt

Some have supposed that a tender of a book debt would not be good on account of its being difficult to ascertain what is due. This however is false for it almost invariably is capable of being reduced to a certainty. The probable idea is that a tender of a book debt is good tho' it is not fully settled -

576.

By whom a Tender may be made -

A tender may be made by any person employed as servant or agent to the Debtor, or his proper re-

Contracts.

representative: as executor or administrator; but a tender made by a stranger who has no concern in the matter is good for nothing. Some say the tender must be personal, made by no body but the Debtor himself. None however pretend that this is the general rule, but they confine it to particular cases, and make this distinction. As if a man engages to pay another a certain sum, it must be done personally. But if at a fixed day it may be done by others. There is no reason in this distinction & it seems to be opposed to another principle in the English Law. "That a person by simply naming himself includes his proper representatives."

Manner of Tendering.

It will not do simply to ask a man whether he will accept the debt, or to tell him you are ready to discharge it. But the money must be produced, offered for acceptance & counted before evidence, so that it may be known whether there was money sufficient to discharge the debt.

The Kind of Money that may be tendered.

In England no money is tenderable but English or that which is made current by proclamation.

Contracts

We have no fixed practice here of proclaiming what shall be current coin - Any coin that is common in circulation & will pass among our Merchants is tenderable - Tender will not do of coppers for a sum of any considerable value, no more than a few for the sake of making change where it could not be made without them. It is the common received but erroneous idea that Coppers are tenderable - Banks notes are tenderable in such places where they are in general circulation; but not the notes of any distant Bank that do not pass currently in the place where tender is ^{to be} made. Counterfeit money is not a good tender - Our Statute has pointed out a remedy to recover good money when counterfeit has been received ignorantly. Formerly Com. Law afforded a remedy to recover true for counterfeit money - but our County Court have lately refused to do this when it could not be discovered who was the rogue; on the principle ^{of sound policy} that one innocent person ought not to be relieved at the expense of another. That Lincaster would have a tendency to impede the progress of Commerce by making men afraid to take money.

Contracts

Where Money may be tendered.

If a place is fixed upon, where the money is to be paid, there it must be tendered. The general rule is that if no place is agreed upon, it must be tendered to the creditor's person, or in his absence to his agent - & if neither creditor nor agent can be found, the being ready to pay is as effectual as a tender. In case of a Mortgage a tender at the house of the Mortgagee is sufficient. A tender made when ^{the} money is loaned is a good tender sometimes. Payment proposed to be made at a particular place & no objection made by the creditor, tender at this place is good. In case a tender by a tenant at the House or the Land from whence the rent issues is sufficient.

Tender of Commodious Articles in some respects different from the tender of money -

If a place is fixed upon, no doubt. If no place is agreed upon the general rule is to tender where the creditor lived when contract was made, or some other place as convenient for the debtor; but if the debtor is requested to make delivery at a certain place imposing no greater duty upon him than the terms of the original contract, he must tender ^{there.}

Contracts

There are instances where the place of paym^t is always fixed without mentioning any particular place as in case of due bills issuing from a Merchants Store.

The time of tendering.

A man promises to pay on or before such a day - Can tender be good before that day? It may, or it may not be good. If the ^{creditor} person was ^{found} at home at any day of this intervening time, a tender would be good. But a tender at his house would not be good, if not personal. When the day of paym^t arrives, a tender of the debt at that day is good. The tender must be made at the latest most convenient part of the day. This critical part of the day is adjudged to be at first time that the money may be counted by day light. If the creditor was at home, any time in the day would do. If the place is fixed & no time the debtor may give notice at what day he will pay the debt & a tender on that day is sufficient. - In case of negotiable notes who is the money to be tendered to? If the debtor knows nothing of the assignment it must be to the original creditor. But the last assignee may appoint any place not more inconvenient for the

Contracts

Debtor than the terms of the original agreement.

Authorities for the subject of Tender -

Coke Litt. ... 2.	7 Rep. ... 13.	Mowd. ... 173.
D. ... 6.	Lath. ... 70.	D. ... 172.
D. ... 7.	3 Lev. ... 104.	Cro. Eliz. ... 714.
D. ... 208.	5 Rep. ... 115.	1 Vent. ... 211.
D. ... 209.	2 P. M. ... 373.	Cro. & Eliz. ... 715.
D. ... 210.	Roll ... 513.	
D. ... 211.		

15th And last defence against Contracts.

Of the Statute of Frauds & Perjuries.

The Statute of frauds & perjuries is pleadable, as a defence, only against special contracts.

It is unnecessary for a man to state in his declaration that the contract he founds his action upon is in writing - it is the Deft's business to plead that it was not in writing & prove this.

The general rule is when the action was bro't upon the writing, for the declaration to count upon the writing, if not the defendant may demur.

There are 5 branches to the Statute of Frauds & Perjuries - 1st That no suit in Law or equity

shall be bro't upon any contract to charge an Executor or administrator upon any special promise to answer damages out of his own estate, - 2^{ndly} Or to charge the Deft upon any

Contracts

N.B. Statute of Limitations prevents a promise being brought after 3 years upon a promise which is not the highest in a year.

promise to answer for another person. Or 3rd to charge any person upon a contract made in consideration of Marriage. Or 4^{thly} Upon any promise relating to the sale of Lands, tenements, hereditaments or any interest concerning them. Or 5^{thly} ^{*} Upon any contract that was not to be performed within a year from the time of making it, - unless the agreement upon which such action shall be brought, or some memorandum or note concerning it shall be made & signed by the party to be charged or some person authorized by him. - Of these in their Order 1st Executors & Administr^{rs} in their respective capacities are not bound by their personal promises, where there are not assets sufficient to fulfill those promises. If however the assets of the testator are sufficient to satisfy all the debts such personal promises are binding. —

2nd A person shall be bound by a personal promise to discharge the debt of another person. This branch has been the occasion of some dispute, which has given rise to a distinction. When a person is & when he is not bound by a promise for another. - If the promise be original it is taken out of the Statute & is bind-

Contracts

ing - if the Promise be Collateral it is within the Stat, consequently void - Original means where the Promisor brings the debt completely upon himself & frees the first promisor - As A. has a note against B. C, a third person steps in & tells A. to burn the note, & he will pay the debt in this case the 2^d Promisor takes the debt completely upon himself - Collateral, means where the promise of the 2nd person only comes in aid of the first promise - As if C. tells B. if A. won't pay the debt he (C.) will. [See ^{3 Burrows 188.} ~~Campbell~~ case of Leprie & Williams. If C. should say to B. "release the property (taken in security) to A. and I will pay the debt" here C. would be bound for he was the occasion of B.'s giving up his lien upon A's property. 1 Willson 305. 3 Burrows 1888. ^{Wm. v. Leprie} A Parol Promise in consideration of marriage is good for nothing - As if a Father should promise a man to give his daughter the sum of 1000^l in consideration of his marrying her - This promise is good for nothing, unless reduced to writing - Tho' any hints of such an intention in writing would make the Promise binding.

As if a Father should write a Letter to his daughter informing her he would give her the 1000[£] if she would marry such a person & this person could make it appear that he saw the letter before he married the daughter, this would be sufficient to bind the Father—

1st. Any parol promise relating to lands &c. are within the Stat. void—

A man who enters upon Land under a parol lease cannot be dealt with as a trespasser.

tho' while he stays there he is answerable for quantum of rent. Many Cases which were formerly within the Statute of Frauds & Perjuries have been taken out by Courts—Chancery first ventured to strike the blow, & Courts of Law have followed their example—As where a contract is executed on one part, Chancery will order a specific execution of it. & at Law damages may be obtained for nonperformance. Here Courts of Law have sustained actions of this kind.

5th ¹¹ ¹² ¹³ ¹⁴ ¹⁵ ¹⁶ ¹⁷ ¹⁸ ¹⁹ ²⁰ ²¹ ²² ²³ ²⁴ ²⁵ ²⁶ ²⁷ ²⁸ ²⁹ ³⁰ ³¹ ³² ³³ ³⁴ ³⁵ ³⁶ ³⁷ ³⁸ ³⁹ ⁴⁰ ⁴¹ ⁴² ⁴³ ⁴⁴ ⁴⁵ ⁴⁶ ⁴⁷ ⁴⁸ ⁴⁹ ⁵⁰ ⁵¹ ⁵² ⁵³ ⁵⁴ ⁵⁵ ⁵⁶ ⁵⁷ ⁵⁸ ⁵⁹ ⁶⁰ ⁶¹ ⁶² ⁶³ ⁶⁴ ⁶⁵ ⁶⁶ ⁶⁷ ⁶⁸ ⁶⁹ ⁷⁰ ⁷¹ ⁷² ⁷³ ⁷⁴ ⁷⁵ ⁷⁶ ⁷⁷ ⁷⁸ ⁷⁹ ⁸⁰ ⁸¹ ⁸² ⁸³ ⁸⁴ ⁸⁵ ⁸⁶ ⁸⁷ ⁸⁸ ⁸⁹ ⁹⁰ ⁹¹ ⁹² ⁹³ ⁹⁴ ⁹⁵ ⁹⁶ ⁹⁷ ⁹⁸ ⁹⁹ ¹⁰⁰ ¹⁰¹ ¹⁰² ¹⁰³ ¹⁰⁴ ¹⁰⁵ ¹⁰⁶ ¹⁰⁷ ¹⁰⁸ ¹⁰⁹ ¹¹⁰ ¹¹¹ ¹¹² ¹¹³ ¹¹⁴ ¹¹⁵ ¹¹⁶ ¹¹⁷ ¹¹⁸ ¹¹⁹ ¹²⁰ ¹²¹ ¹²² ¹²³ ¹²⁴ ¹²⁵ ¹²⁶ ¹²⁷ ¹²⁸ ¹²⁹ ¹³⁰ ¹³¹ ¹³² ¹³³ ¹³⁴ ¹³⁵ ¹³⁶ ¹³⁷ ¹³⁸ ¹³⁹ ¹⁴⁰ ¹⁴¹ ¹⁴² ¹⁴³ ¹⁴⁴ ¹⁴⁵ ¹⁴⁶ ¹⁴⁷ ¹⁴⁸ ¹⁴⁹ ¹⁵⁰ ¹⁵¹ ¹⁵² ¹⁵³ ¹⁵⁴ ¹⁵⁵ ¹⁵⁶ ¹⁵⁷ ¹⁵⁸ ¹⁵⁹ ¹⁶⁰ ¹⁶¹ ¹⁶² ¹⁶³ ¹⁶⁴ ¹⁶⁵ ¹⁶⁶ ¹⁶⁷ ¹⁶⁸ ¹⁶⁹ ¹⁷⁰ ¹⁷¹ ¹⁷² ¹⁷³ ¹⁷⁴ ¹⁷⁵ ¹⁷⁶ ¹⁷⁷ ¹⁷⁸ ¹⁷⁹ ¹⁸⁰ ¹⁸¹ ¹⁸² ¹⁸³ ¹⁸⁴ ¹⁸⁵ ¹⁸⁶ ¹⁸⁷ ¹⁸⁸ ¹⁸⁹ ¹⁹⁰ ¹⁹¹ ¹⁹² ¹⁹³ ¹⁹⁴ ¹⁹⁵ ¹⁹⁶ ¹⁹⁷ ¹⁹⁸ ¹⁹⁹ ²⁰⁰ ²⁰¹ ²⁰² ²⁰³ ²⁰⁴ ²⁰⁵ ²⁰⁶ ²⁰⁷ ²⁰⁸ ²⁰⁹ ²¹⁰ ²¹¹ ²¹² ²¹³ ²¹⁴ ²¹⁵ ²¹⁶ ²¹⁷ ²¹⁸ ²¹⁹ ²²⁰ ²²¹ ²²² ²²³ ²²⁴ ²²⁵ ²²⁶ ²²⁷ ²²⁸ ²²⁹ ²³⁰ ²³¹ ²³² ²³³ ²³⁴ ²³⁵ ²³⁶ ²³⁷ ²³⁸ ²³⁹ ²⁴⁰ ²⁴¹ ²⁴² ²⁴³ ²⁴⁴ ²⁴⁵ ²⁴⁶ ²⁴⁷ ²⁴⁸ ²⁴⁹ ²⁵⁰ ²⁵¹ ²⁵² ²⁵³ ²⁵⁴ ²⁵⁵ ²⁵⁶ ²⁵⁷ ²⁵⁸ ²⁵⁹ ²⁶⁰ ²⁶¹ ²⁶² ²⁶³ ²⁶⁴ ²⁶⁵ ²⁶⁶ ²⁶⁷ ²⁶⁸ ²⁶⁹ ²⁷⁰ ²⁷¹ ²⁷² ²⁷³ ²⁷⁴ ²⁷⁵ ²⁷⁶ ²⁷⁷ ²⁷⁸ ²⁷⁹ ²⁸⁰ ²⁸¹ ²⁸² ²⁸³ ²⁸⁴ ²⁸⁵ ²⁸⁶ ²⁸⁷ ²⁸⁸ ²⁸⁹ ²⁹⁰ ²⁹¹ ²⁹² ²⁹³ ²⁹⁴ ²⁹⁵ ²⁹⁶ ²⁹⁷ ²⁹⁸ ²⁹⁹ ³⁰⁰ ³⁰¹ ³⁰² ³⁰³ ³⁰⁴ ³⁰⁵ ³⁰⁶ ³⁰⁷ ³⁰⁸ ³⁰⁹ ³¹⁰ ³¹¹ ³¹² ³¹³ ³¹⁴ ³¹⁵ ³¹⁶ ³¹⁷ ³¹⁸ ³¹⁹ ³²⁰ ³²¹ ³²² ³²³ ³²⁴ ³²⁵ ³²⁶ ³²⁷ ³²⁸ ³²⁹ ³³⁰ ³³¹ ³³² ³³³ ³³⁴ ³³⁵ ³³⁶ ³³⁷ ³³⁸ ³³⁹ ³⁴⁰ ³⁴¹ ³⁴² ³⁴³ ³⁴⁴ ³⁴⁵ ³⁴⁶ ³⁴⁷ ³⁴⁸ ³⁴⁹ ³⁵⁰ ³⁵¹ ³⁵² ³⁵³ ³⁵⁴ ³⁵⁵ ³⁵⁶ ³⁵⁷ ³⁵⁸ ³⁵⁹ ³⁶⁰ ³⁶¹ ³⁶² ³⁶³ ³⁶⁴ ³⁶⁵ ³⁶⁶ ³⁶⁷ ³⁶⁸ ³⁶⁹ ³⁷⁰ ³⁷¹ ³⁷² ³⁷³ ³⁷⁴ ³⁷⁵ ³⁷⁶ ³⁷⁷ ³⁷⁸ ³⁷⁹ ³⁸⁰ ³⁸¹ ³⁸² ³⁸³ ³⁸⁴ ³⁸⁵ ³⁸⁶ ³⁸⁷ ³⁸⁸ ³⁸⁹ ³⁹⁰ ³⁹¹ ³⁹² ³⁹³ ³⁹⁴ ³⁹⁵ ³⁹⁶ ³⁹⁷ ³⁹⁸ ³⁹⁹ ⁴⁰⁰ ⁴⁰¹ ⁴⁰² ⁴⁰³ ⁴⁰⁴ ⁴⁰⁵ ⁴⁰⁶ ⁴⁰⁷ ⁴⁰⁸ ⁴⁰⁹ ⁴¹⁰ ⁴¹¹ ⁴¹² ⁴¹³ ⁴¹⁴ ⁴¹⁵ ⁴¹⁶ ⁴¹⁷ ⁴¹⁸ ⁴¹⁹ ⁴²⁰ ⁴²¹ ⁴²² ⁴²³ ⁴²⁴ ⁴²⁵ ⁴²⁶ ⁴²⁷ ⁴²⁸ ⁴²⁹ ⁴³⁰ ⁴³¹ ⁴³² ⁴³³ ⁴³⁴ ⁴³⁵ ⁴³⁶ ⁴³⁷ ⁴³⁸ ⁴³⁹ ⁴⁴⁰ ⁴⁴¹ ⁴⁴² ⁴⁴³ ⁴⁴⁴ ⁴⁴⁵ ⁴⁴⁶ ⁴⁴⁷ ⁴⁴⁸ ⁴⁴⁹ ⁴⁵⁰ ⁴⁵¹ ⁴⁵² ⁴⁵³ ⁴⁵⁴ ⁴⁵⁵ ⁴⁵⁶ ⁴⁵⁷ ⁴⁵⁸ ⁴⁵⁹ ⁴⁶⁰ ⁴⁶¹ ⁴⁶² ⁴⁶³ ⁴⁶⁴ ⁴⁶⁵ ⁴⁶⁶ ⁴⁶⁷ ⁴⁶⁸ ⁴⁶⁹ ⁴⁷⁰ ⁴⁷¹ ⁴⁷² ⁴⁷³ ⁴⁷⁴ ⁴⁷⁵ ⁴⁷⁶ ⁴⁷⁷ ⁴⁷⁸ ⁴⁷⁹ ⁴⁸⁰ ⁴⁸¹ ⁴⁸² ⁴⁸³ ⁴⁸⁴ ⁴⁸⁵ ⁴⁸⁶ ⁴⁸⁷ ⁴⁸⁸ ⁴⁸⁹ ⁴⁹⁰ ⁴⁹¹ ⁴⁹² ⁴⁹³ ⁴⁹⁴ ⁴⁹⁵ ⁴⁹⁶ ⁴⁹⁷ ⁴⁹⁸ ⁴⁹⁹ ⁵⁰⁰ ⁵⁰¹ ⁵⁰² ⁵⁰³ ⁵⁰⁴ ⁵⁰⁵ ⁵⁰⁶ ⁵⁰⁷ ⁵⁰⁸ ⁵⁰⁹ ⁵¹⁰ ⁵¹¹ ⁵¹² ⁵¹³ ⁵¹⁴ ⁵¹⁵ ⁵¹⁶ ⁵¹⁷ ⁵¹⁸ ⁵¹⁹ ⁵²⁰ ⁵²¹ ⁵²² ⁵²³ ⁵²⁴ ⁵²⁵ ⁵²⁶ ⁵²⁷ ⁵²⁸ ⁵²⁹ ⁵³⁰ ⁵³¹ ⁵³² ⁵³³ ⁵³⁴ ⁵³⁵ ⁵³⁶ ⁵³⁷ ⁵³⁸ ⁵³⁹ ⁵⁴⁰ ⁵⁴¹ ⁵⁴² ⁵⁴³ ⁵⁴⁴ ⁵⁴⁵ ⁵⁴⁶ ⁵⁴⁷ ⁵⁴⁸ ⁵⁴⁹ ⁵⁵⁰ ⁵⁵¹ ⁵⁵² ⁵⁵³ ⁵⁵⁴ ⁵⁵⁵ ⁵⁵⁶ ⁵⁵⁷ ⁵⁵⁸ ⁵⁵⁹ ⁵⁶⁰ ⁵⁶¹ ⁵⁶² ⁵⁶³ ⁵⁶⁴ ⁵⁶⁵ ⁵⁶⁶ ⁵⁶⁷ ⁵⁶⁸ ⁵⁶⁹ ⁵⁷⁰ ⁵⁷¹ ⁵⁷² ⁵⁷³ ⁵⁷⁴ ⁵⁷⁵ ⁵⁷⁶ ⁵⁷⁷ ⁵⁷⁸ ⁵⁷⁹ ⁵⁸⁰ ⁵⁸¹ ⁵⁸² ⁵⁸³ ⁵⁸⁴ ⁵⁸⁵ ⁵⁸⁶ ⁵⁸⁷ ⁵⁸⁸ ⁵⁸⁹ ⁵⁹⁰ ⁵⁹¹ ⁵⁹² ⁵⁹³ ⁵⁹⁴ ⁵⁹⁵ ⁵⁹⁶ ⁵⁹⁷ ⁵⁹⁸ ⁵⁹⁹ ⁶⁰⁰ ⁶⁰¹ ⁶⁰² ⁶⁰³ ⁶⁰⁴ ⁶⁰⁵ ⁶⁰⁶ ⁶⁰⁷ ⁶⁰⁸ ⁶⁰⁹ ⁶¹⁰ ⁶¹¹ ⁶¹² ⁶¹³ ⁶¹⁴ ⁶¹⁵ ⁶¹⁶ ⁶¹⁷ ⁶¹⁸ ⁶¹⁹ ⁶²⁰ ⁶²¹ ⁶²² ⁶²³ ⁶²⁴ ⁶²⁵ ⁶²⁶ ⁶²⁷ ⁶²⁸ ⁶²⁹ ⁶³⁰ ⁶³¹ ⁶³² ⁶³³ ⁶³⁴ ⁶³⁵ ⁶³⁶ ⁶³⁷ ⁶³⁸ ⁶³⁹ ⁶⁴⁰ ⁶⁴¹ ⁶⁴² ⁶⁴³ ⁶⁴⁴ ⁶⁴⁵ ⁶⁴⁶ ⁶⁴⁷ ⁶⁴⁸ ⁶⁴⁹ ⁶⁵⁰ ⁶⁵¹ ⁶⁵² ⁶⁵³ ⁶⁵⁴ ⁶⁵⁵ ⁶⁵⁶ ⁶⁵⁷ ⁶⁵⁸ ⁶⁵⁹ ⁶⁶⁰ ⁶⁶¹ ⁶⁶² ⁶⁶³ ⁶⁶⁴ ⁶⁶⁵ ⁶⁶⁶ ⁶⁶⁷ ⁶⁶⁸ ⁶⁶⁹ ⁶⁷⁰ ⁶⁷¹ ⁶⁷² ⁶⁷³ ⁶⁷⁴ ⁶⁷⁵ ⁶⁷⁶ ⁶⁷⁷ ⁶⁷⁸ ⁶⁷⁹ ⁶⁸⁰ ⁶⁸¹ ⁶⁸² ⁶⁸³ ⁶⁸⁴ ⁶⁸⁵ ⁶⁸⁶ ⁶⁸⁷ ⁶⁸⁸ ⁶⁸⁹ ⁶⁹⁰ ⁶⁹¹ ⁶⁹² ⁶⁹³ ⁶⁹⁴ ⁶⁹⁵ ⁶⁹⁶ ⁶⁹⁷ ⁶⁹⁸ ⁶⁹⁹ ⁷⁰⁰ ⁷⁰¹ ⁷⁰² ⁷⁰³ ⁷⁰⁴ ⁷⁰⁵ ⁷⁰⁶ ⁷⁰⁷ ⁷⁰⁸ ⁷⁰⁹ ⁷¹⁰ ⁷¹¹ ⁷¹² ⁷¹³ ⁷¹⁴ ⁷¹⁵ ⁷¹⁶ ⁷¹⁷ ⁷¹⁸ ⁷¹⁹ ⁷²⁰ ⁷²¹ ⁷²² ⁷²³ ⁷²⁴ ⁷²⁵ ⁷²⁶ ⁷²⁷ ⁷²⁸ ⁷²⁹ ⁷³⁰ ⁷³¹ ⁷³² ⁷³³ ⁷³⁴ ⁷³⁵ ⁷³⁶ ⁷³⁷ ⁷³⁸ ⁷³⁹ ⁷⁴⁰ ⁷⁴¹ ⁷⁴² ⁷⁴³ ⁷⁴⁴ ⁷⁴⁵ ⁷⁴⁶ ⁷⁴⁷ ⁷⁴⁸ ⁷⁴⁹ ⁷⁵⁰ ⁷⁵¹ ⁷⁵² ⁷⁵³ ⁷⁵⁴ ⁷⁵⁵ ⁷⁵⁶ ⁷⁵⁷ ⁷⁵⁸ ⁷⁵⁹ ⁷⁶⁰ ⁷⁶¹ ⁷⁶² ⁷⁶³ ⁷⁶⁴ ⁷⁶⁵ ⁷⁶⁶ ⁷⁶⁷ ⁷⁶⁸ ⁷⁶⁹ ⁷⁷⁰ ⁷⁷¹ ⁷⁷² ⁷⁷³ ⁷⁷⁴ ⁷⁷⁵ ⁷⁷⁶ ⁷⁷⁷ ⁷⁷⁸ ⁷⁷⁹ ⁷⁸⁰ ⁷⁸¹ ⁷⁸² ⁷⁸³ ⁷⁸⁴ ⁷⁸⁵ ⁷⁸⁶ ⁷⁸⁷ ⁷⁸⁸ ⁷⁸⁹ ⁷⁹⁰ ⁷⁹¹ ⁷⁹² ⁷⁹³ ⁷⁹⁴ ⁷⁹⁵ ⁷⁹⁶ ⁷⁹⁷ ⁷⁹⁸ ⁷⁹⁹ ⁸⁰⁰ ⁸⁰¹ ⁸⁰² ⁸⁰³ ⁸⁰⁴ ⁸⁰⁵ ⁸⁰⁶ ⁸⁰⁷ ⁸⁰⁸ ⁸⁰⁹ ⁸¹⁰ ⁸¹¹ ⁸¹² ⁸¹³ ⁸¹⁴ ⁸¹⁵ ⁸¹⁶ ⁸¹⁷ ⁸¹⁸ ⁸¹⁹ ⁸²⁰ ⁸²¹ ⁸²² ⁸²³ ⁸²⁴ ⁸²⁵ ⁸²⁶ ⁸²⁷ ⁸²⁸ ⁸²⁹ ⁸³⁰ ⁸³¹ ⁸³² ⁸³³ ⁸³⁴ ⁸³⁵ ⁸³⁶ ⁸³⁷ ⁸³⁸ ⁸³⁹ ⁸⁴⁰ ⁸⁴¹ ⁸⁴² ⁸⁴³ ⁸⁴⁴ ⁸⁴⁵ ⁸⁴⁶ ⁸⁴⁷ ⁸⁴⁸ ⁸⁴⁹ ⁸⁵⁰ ⁸⁵¹ ⁸⁵² ⁸⁵³ ⁸⁵⁴ ⁸⁵⁵ ⁸⁵⁶ ⁸⁵⁷ ⁸⁵⁸ ⁸⁵⁹ ⁸⁶⁰ ⁸⁶¹ ⁸⁶² ⁸⁶³ ⁸⁶⁴ ⁸⁶⁵ ⁸⁶⁶ ⁸⁶⁷ ⁸⁶⁸ ⁸⁶⁹ ⁸⁷⁰ ⁸⁷¹ ⁸⁷² ⁸⁷³ ⁸⁷⁴ ⁸⁷⁵ ⁸⁷⁶ ⁸⁷⁷ ⁸⁷⁸ ⁸⁷⁹ ⁸⁸⁰ ⁸⁸¹ ⁸⁸² ⁸⁸³ ⁸⁸⁴ ⁸⁸⁵ ⁸⁸⁶ ⁸⁸⁷ ⁸⁸⁸ ⁸⁸⁹ ⁸⁹⁰ ⁸⁹¹ ⁸⁹² ⁸⁹³ ⁸⁹⁴ ⁸⁹⁵ ⁸⁹⁶ ⁸⁹⁷ ⁸⁹⁸ ⁸⁹⁹ ⁹⁰⁰ ⁹⁰¹ ⁹⁰² ⁹⁰³ ⁹⁰⁴ ⁹⁰⁵ ⁹⁰⁶ ⁹⁰⁷ ⁹⁰⁸ ⁹⁰⁹ ⁹¹⁰ ⁹¹¹ ⁹¹² ⁹¹³ ⁹¹⁴ ⁹¹⁵ ⁹¹⁶ ⁹¹⁷ ⁹¹⁸ ⁹¹⁹ ⁹²⁰ ⁹²¹ ⁹²² ⁹²³ ⁹²⁴ ⁹²⁵ ⁹²⁶ ⁹²⁷ ⁹²⁸ ⁹²⁹ ⁹³⁰ ⁹³¹ ⁹³² ⁹³³ ⁹³⁴ ⁹³⁵ ⁹³⁶ ⁹³⁷ ⁹³⁸ ⁹³⁹ ⁹⁴⁰ ⁹⁴¹ ⁹⁴² ⁹⁴³ ⁹⁴⁴ ⁹⁴⁵ ⁹⁴⁶ ⁹⁴⁷ ⁹⁴⁸ ⁹⁴⁹ ⁹⁵⁰ ⁹⁵¹ ⁹⁵² ⁹⁵³ ⁹⁵⁴ ⁹⁵⁵ ⁹⁵⁶ ⁹⁵⁷ ⁹⁵⁸ ⁹⁵⁹ ⁹⁶⁰ ⁹⁶¹ ⁹⁶² ⁹⁶³ ⁹⁶⁴ ⁹⁶⁵ ⁹⁶⁶ ⁹⁶⁷ ⁹⁶⁸ ⁹⁶⁹ ⁹⁷⁰ ⁹⁷¹ ⁹⁷² ⁹⁷³ ⁹⁷⁴ ⁹⁷⁵ ⁹⁷⁶ ⁹⁷⁷ ⁹⁷⁸ ⁹⁷⁹ ⁹⁸⁰ ⁹⁸¹ ⁹⁸² ⁹⁸³ ⁹⁸⁴ ⁹⁸⁵ ⁹⁸⁶ ⁹⁸⁷ ⁹⁸⁸ ⁹⁸⁹ ⁹⁹⁰ ⁹⁹¹ ⁹⁹² ⁹⁹³ ⁹⁹⁴ ⁹⁹⁵ ⁹⁹⁶ ⁹⁹⁷ ⁹⁹⁸ ⁹⁹⁹ ¹⁰⁰⁰ ¹⁰⁰¹ ¹⁰⁰² ¹⁰⁰³ ¹⁰⁰⁴ ¹⁰⁰⁵ ¹⁰⁰⁶ ¹⁰⁰⁷ ¹⁰⁰⁸ ¹⁰⁰⁹ ¹⁰¹⁰ ¹⁰¹¹ ¹⁰¹² ¹⁰¹³ ¹⁰¹⁴ ¹⁰¹⁵ ¹⁰¹⁶ ¹⁰¹⁷ ¹⁰¹⁸ ¹⁰¹⁹ ¹⁰²⁰ ¹⁰²¹ ¹⁰²² ¹⁰²³ ¹⁰²⁴ ¹⁰²⁵ ¹⁰²⁶ ¹⁰²⁷ ¹⁰²⁸ ¹⁰²⁹ ¹⁰³⁰ ¹⁰³¹ ¹⁰³² ¹⁰³³ ¹⁰³⁴ ¹⁰³⁵ ¹⁰³⁶ ¹⁰³⁷ ¹⁰³⁸ ¹⁰³⁹ ¹⁰⁴⁰ ¹⁰⁴¹ ¹⁰⁴² ¹⁰⁴³ ¹⁰⁴⁴ ¹⁰⁴⁵ ¹⁰⁴⁶ ¹⁰⁴⁷ ¹⁰⁴⁸ ¹⁰⁴⁹ ¹⁰⁵⁰ ¹⁰⁵¹ ¹⁰⁵² ¹⁰⁵³ ¹⁰⁵⁴ ¹⁰⁵⁵ ¹⁰⁵⁶ ¹⁰⁵⁷ ¹⁰⁵⁸ ¹⁰⁵⁹ ¹⁰⁶⁰ ¹⁰⁶¹ ¹⁰⁶² ¹⁰⁶³ ¹⁰⁶⁴ ¹⁰⁶⁵ ¹⁰⁶⁶ ¹⁰⁶⁷ ¹⁰⁶⁸ ¹⁰⁶⁹ ¹⁰⁷⁰ ¹⁰⁷¹ ¹⁰⁷² ¹⁰⁷³ ¹⁰⁷⁴ ¹⁰⁷⁵ ¹⁰⁷⁶ ¹⁰⁷⁷ ¹⁰⁷⁸ ¹⁰⁷⁹ ¹⁰⁸⁰ ¹⁰⁸¹ ¹⁰⁸² ¹⁰⁸³ ¹⁰⁸⁴ ¹⁰⁸⁵ ¹⁰⁸⁶ ¹⁰⁸⁷ ¹⁰⁸⁸ ¹⁰⁸⁹ ¹⁰⁹⁰ ¹⁰⁹¹ ¹⁰⁹² ¹⁰⁹³ ¹⁰⁹⁴ ¹⁰⁹⁵ ¹⁰⁹⁶ ¹⁰⁹⁷ ¹⁰⁹⁸ ¹⁰⁹⁹ ¹¹⁰⁰ ¹¹⁰¹ ¹¹⁰² ¹¹⁰³ ¹¹⁰⁴ ¹¹⁰⁵ ¹¹⁰⁶ ¹¹⁰⁷ ¹¹⁰⁸ ¹¹⁰⁹ ¹¹¹⁰ ¹¹¹¹ ¹¹¹² ¹¹¹³ ¹¹¹⁴ ¹¹¹⁵ ¹¹¹⁶ ¹¹¹⁷ ¹¹¹⁸ ¹¹¹⁹ ¹¹²⁰ ¹¹²¹ ¹¹²² ¹¹²³ ¹¹²⁴ ¹¹²⁵ ¹¹²⁶ ¹¹²⁷ ¹¹²⁸ ¹¹²⁹ ¹¹³⁰ ¹¹³¹ ¹¹³² ¹¹³³ ¹¹³⁴ ¹¹³⁵ ¹¹³⁶ ¹¹³⁷ ¹¹³⁸ ¹¹³⁹ ¹¹⁴⁰ ¹¹⁴¹ ¹¹⁴² ¹¹⁴³ ¹¹⁴⁴ ¹¹⁴⁵ ¹¹⁴⁶ ¹¹⁴⁷ ¹¹⁴⁸ ¹¹⁴⁹ ¹¹⁵⁰ ¹¹⁵¹ ¹¹⁵² ¹¹⁵³ ¹¹⁵⁴ ¹¹⁵⁵ ¹¹⁵⁶ ¹¹⁵⁷ ¹¹⁵⁸ ¹¹⁵⁹ ¹¹⁶⁰ ¹¹⁶¹ ¹¹⁶² ¹¹⁶³ ¹¹⁶⁴ ¹¹⁶⁵ ¹¹⁶⁶ ¹¹⁶⁷ ¹¹⁶⁸ ¹¹⁶⁹ ¹¹⁷⁰ ¹¹⁷¹ ¹¹⁷² ¹¹⁷³ ¹¹⁷⁴ ¹¹⁷⁵ ¹¹⁷⁶ ¹¹⁷⁷ ¹¹⁷⁸ ¹¹⁷⁹ ¹¹⁸⁰ ¹¹⁸¹ ¹¹⁸² ¹¹⁸³ ¹¹⁸⁴ ¹¹⁸⁵ ¹¹⁸⁶ ¹¹⁸⁷ ¹¹⁸⁸ ¹¹⁸⁹ ¹¹⁹⁰ ¹¹⁹¹ ¹¹⁹² ¹¹⁹³ ¹¹⁹⁴ ¹¹⁹⁵ ¹¹⁹⁶ ¹¹⁹⁷ ¹¹⁹⁸ ¹¹⁹⁹ ¹²⁰⁰ ¹²⁰¹ ¹²⁰² ¹²⁰³ ¹²⁰⁴ ¹²⁰⁵ ¹²⁰⁶ ¹²⁰⁷ ¹²⁰⁸ ¹²⁰⁹ ¹²¹⁰ ¹²¹¹ ¹²¹² ¹²¹³ ¹²¹⁴ ¹²¹⁵ ¹²¹⁶ ¹²¹⁷ ¹²¹⁸ ¹²¹⁹ ¹²²⁰ ¹²²¹ ¹²²² ¹²²³ ¹²²⁴ ¹²²⁵ ¹²²⁶ ¹²²⁷ ¹²²⁸ ¹²²⁹ ¹²³⁰ ¹²³¹ ¹²³² ¹²³³ ¹²³⁴ ¹²³⁵ ¹²³⁶ ¹²³⁷ ¹²³⁸ ¹²³⁹ ¹²⁴⁰ ¹²⁴¹ ¹²⁴² ¹²⁴³ ¹²⁴⁴ ¹²⁴⁵ ¹²⁴⁶ ¹²⁴⁷ ¹²⁴⁸ ¹²⁴⁹ ¹²⁵⁰ ¹²⁵¹ ¹²⁵² ¹²⁵³ ¹²⁵⁴ ¹²⁵⁵ ¹²⁵⁶ ¹²⁵⁷ ¹²⁵⁸ ¹²⁵⁹ ¹²⁶⁰ ¹²⁶¹ ¹²⁶² ¹²⁶³ ¹²⁶⁴ ¹²⁶⁵ ¹²⁶⁶ ¹²⁶⁷ ¹²⁶⁸ ¹²⁶⁹ ¹²⁷⁰ ¹²⁷¹ ¹²⁷² ¹²⁷³ ¹²⁷⁴ ¹²⁷⁵ ¹²⁷⁶ ¹²⁷⁷ ¹²⁷⁸ ¹²⁷⁹ ¹²⁸⁰ ¹²⁸¹ ¹²⁸² ¹²⁸³ ¹²⁸⁴ ¹²⁸⁵ ¹²⁸⁶ ¹²⁸⁷ ¹²⁸⁸ ¹²⁸⁹ ¹²⁹⁰ ¹²⁹¹ ¹²⁹² ¹²⁹³ ¹²⁹⁴ ¹²⁹⁵ ¹²⁹⁶ ¹²⁹⁷ ¹²⁹⁸ ¹²⁹⁹ ¹³⁰⁰ ¹³⁰¹ ¹³⁰² ¹³⁰³ ¹³⁰⁴ ¹³⁰⁵ ¹³⁰⁶ ¹³⁰⁷ ¹³⁰⁸ ¹³⁰⁹ ¹³¹⁰ ¹³¹¹ ¹³¹² ¹³¹³ ¹³¹⁴ ¹³¹⁵ ¹³¹⁶ ¹³¹⁷ ¹³¹⁸ ¹³¹⁹ ¹³²⁰ ¹³²¹ ¹³²² ¹³²³ ¹³²⁴ ¹³²⁵ ¹³²⁶ ¹³²⁷ ¹³²⁸ ¹³²⁹ ¹³³⁰ ¹³³¹ ¹³³² ¹³³³ ¹³³⁴ ¹³³⁵ ¹³³⁶ ¹³³⁷ ¹³³⁸ ¹³³⁹ ¹³⁴⁰ ¹³⁴¹ ¹³⁴² ¹³⁴³ ¹³⁴⁴ ¹³⁴⁵ ¹³⁴⁶ ¹³⁴⁷

10.
it is sufficient, but in estate to pay, as the debt, as the specialty and
it has been taken out of the personal fund, yet simple contract creditors
must go upon the real estate, the holder being the proper fund for them.
yet specialty creditors may be, which they please

Of the Estate of a deceased person
Chapter 1st

Principles of the English Law on the
Real & Personal estates of Deceased persons.

The Law of Eng, respecting the manage-
ment of the Real property of a deceased person
is different from the Law respecting Personal pro-
perty. The real vests immediately in the heir, &
the personal in the administrator. Real estate
in the hands of the heir, is not liable to creditors
unless for particular kind of debts when the
decedent has bound his heir by a special writing
under seal. For any but specialty debts the real
property is not to be touched, by any remedy
either in Law or Chancery. If the heir has once
redeemed the land by discharging the specialty
debts, that land is afterwards liable to no cred-
itors. At Com. Law the heir might sell the land
immediately upon the death of the intestate & not
be liable to pay specialty debts. In this situation
a wide door was open for injustice & imposition;
but a Stat. intervened in the reign of Mr & Mary,
making the heir liable to the specialty creditors
if he sold the Real Estate. ^{In this case the personal property may be taken from} The real property is
not the only fund for the discharge of specialty
debts. The personal estate in the hands of the

Estate of Deed Persons

Administrator may be resorted to by the Specialty creditors if they please. Specialty Creditors may take personal property in preference to simple contract creditors. We will suppose a man died worth 1000£ - 500£ real & 500£ personal property - owing 500£ by bond & 250 by simple contract. The Specialty creditor may resort to the Real or Personal fund, if to the Personal, he may exhaust this fund & thus exclude the simple contract creditor from a recovery. If the creditor by bond had taken only 250£ from the personal estate & then resorted to the real fund for the residue, the creditor by simple contract would have recovered his whole debt. But by ~~taking~~ exhausting the personal fund he leaves the simple contract creditor ^{at Law} remediless. Obviating the manifest injustice of these ^{principles} Courts of Chancery have interfered, & tho' they have not entirely broken up the system, they have acknowledged its absurdity & afforded a partial relief. If Specialty creditors have exhausted the personal property, Chancery will let in & have not broadened the real, Chancery will let in the simple contract creditors upon the real property, to the amount of the Specialty debts, ^{paid out of the personalty} but no farther. Thus in the case supposed above if

simply him to sell - also if land is sold by trustees appointed by will, or by Chancery, it is equitable as to the & is averaged -

Estate of Deed Persons

The personal fund was exhausted by specially creditors, the simple contract creditors would by application to chancery stand in the place of creditors by bond & exhaust the whole real fund viz. 500^l. - If there had been no specially debts & no personal estate. The simple-contract creditors could not have taken hold of the realty, but would have been without remedy. - When real property is laid open to simple contract creditors there is no priority of rank among them by applying first or otherwise. - & if specially debts ^{taken out of the personal fund} do not amount to enough to satisfy ^{simple contract cred.} ~~them~~ Chancery will average it among them. -

Of the Personal estate.

Personal estate of the Dec^d is corrod^d. Assets in the hands of the Administrator, to pay all debts to the extent of those assets, & no further. Debts are to be paid according to a certain rank, the administrator must observe this, or he cannot protect himself against claims of a prior rank. Amongst creditors of equal rank there is no average, - the administrator may prefer whom he pleases unless by legal diligence one creditor has gained a priority, by instituting his suit & obtaining judgement first. He has not the priority who institutes his suit first but he who

obtains judgement, first. ^{& if the Executor} If the administrator becomes Bankrupt & squanders away the assets, as he is obliged to give Bonds, the Creditor may resort to the Bondsmen to the extent of the bond. If an executor becomes Bankrupt there is no bond to resort to, unless such executor has been compelled to procure bonds. But if either administrator or executor has proceeded to pay legacies or distribute the estate among the Representatives, such estate may be in Equity pursued by creditors, or they may come upon the Administrator & he in his turn may compel the Legatees to refund to the extent of the debt.

Assets in Law & Assets in Equity. —

There are assets in Equity, which are not so in Law. Equities of redemption ^{were not till lately} ~~are not considered~~ ^{as legal} assets in Law, tho' they are in Equity. By applying to Chancery Creditors may obtain a decree for the sale of Equitable assets & their avails will be averaged among the Creditors with no regard to priority of rank. — There are some cases when there is no other way to get at property, but by application to Chancery, if this property when obtained consists of legal assets Chancery will distribute it according

See Key
662

Estate of Deceased persons -

to priority of rank, as a Court of Law would. Altho the Real estate is not generally the fund for the payment of debts, yet the Testator may charge his lands with the payment of his debts in a variety of ways. He may empower the executor to sell the lands & his deed is valid - if ~~however~~ ^{and if} ~~just~~ ^{case} he refuses to sell he may be compelled by Chancery. The Testator may give the lands to the executor to sell & pay debts which vests a fee in the executor & renders him liable to creditors to the value of the land unless he sell it. The Testator may also devise to a certain person with the incumbrance of paying ^{certain} debts. If the devisee accepts of this devise on this * condition he is liable to the extent of the debts ^{with which the lands are charged} if he declines to accept, the land devolves to the heir & he is liable to creditors to the extent of the value of the land -

Lands ordered by Testator to be sold for portions are not assets in the hands of the executor but in the hands of the devisee they are assets. The testator cannot release his estate from its liability to pay specialty debts. - A Reversion is reckoned among the assets. There is one species of reversion however not assets - as where

* Where real property is thus charged with debts the personal property is not charged - if the devisee will not pay the debts the creditor can sell him or such estate may come upon the Ex^r & then the Ex^r may take the value of the devise
 Exec^r in this case does not regard the land but as if the land were sold & he had the proceeds
 Lett. 8.

an estate tail is given on failure of the grantee's issue to revert to the heir. This would not be consid^d assets on account of its uncertainty & its being liable to be cut off by sale, yet when the time in tail should fail soon & the estate should revert to the heir, it would be assets in his hands. Choses in action are assets, but the Administrator is not liable to pay till they are recoverable. judgment must be ^{rendered against him} quando acciderunt.

All the profits of the personal estate are in the hands of the executor & are assets, as a lease for years all the profits above the rent are assets at the end of one year after the Testator's death. After the first year executors must pay interest for unpaid legacies. All the interest of the ^{intestate's} Testator's money is assets. Damages also recovered for an injury in the intestate's life or afterwards. Goods lost by accident without any neglect on the part of the executor are not assets. Goods held by the Testator as Trustee for another are not assets in the hands of the executor. An estate of a bestowen trust ~~is not legal~~ assets in the hands of his executor, but equitable. An assigned bond is not assets.

Duty of Administrators & Executors

After burying the Deceased & moving the will &c they must first pay off all the debts with the

Estate of Deceased Persons

assets. If any were left after discharging debts, the administrator must distribute it among the representatives &c of the Decd accordg to Stat. of Charles 2nd. This estate vests in the representative immediately on the death of the decd before distribution, so that if a such representative should die before distrib^{tion} the property would go to his Representative. - The duty of the execut^r after discharging debts is to observe if any Legacies are due. He must see whether the Legacies are Specific or pecuniary. Specific is where a particular article is marked out as a horse or an op^{er} &c. Pecuniary is a sum of money. If there still should be a Residuum he must observe whether there is a residuary Legatee & ^{if so} pay the residuum to him. But in case of no Residuary Legatee - Where shall the estate go? Formerly the executor was accountable to nobody for the residuum, it devolving to him by virtue of his executorship, for the presumption was that the Testator had made provision for all he wished to. - But now if the executor has a Legacy, he has nothing to do with the residuum; he is the trustee of the next of kin for the residuary sum. If however the Legacy does not appear to have been given for his trouble as a ring &c it will not deprive

him of the residuum. But where there is suffi- 10th May.
cient on the face of the will, by means of a com- 550.
pulsent legacy or expressed to be for his trouble 40
to imply that the executor should not have 568.
the residue he shall be trustee to the next of Bro. & Lin.
kin - Chancery will admit parol proof to show 162.
that the Testator desired the executor should 91.
have the residuum notwithstanding the Lega- 226
cy. [1 Will. 313. 8] 220
cy. [Lawyer in Eng. endeavor to account for this] 27.
otherwise than by considering it as an excep- ^{there are}
tion to the general rule of admission of testimony. ^{authorities}
but notwithstanding all they have said it ^{for the last}
must be carried ~~in~~ ^{with} exception. But they will ^{page}
not let in parol testimony to show that the Tes-
tator meant the executor should not have the resid-
uum where there has been no legacy given him.

It is a rule in Chancery that parol proof may
be admitted to rebut an Equity & not an implica-
tion of Law; which ~~was~~ ^{is} ~~intended~~ ^{to mean} the
same thing. - If a Debtor be made executor it is R. 6th. 136.
said his debt is extinguished, but it is in Fact 1 Roll 934.
only a release of the action & he is accountable. 15 Vels. 160
the Creditors to the extent of the Debt unless there Bro. & Bar.
be a residuum. The reason given when the action 372.
is released is not the true reason, the reason of-
fered is "That an executor cannot sue himself." for
it would be no more absurd than for an Adminis-
trator to sue himself when he is a debtor to the Decd. 186.

Estate of Deceased Person

Mid. 79. It was never intended that the action was re-
 Halk. 306. leared in the last case. The executor's debt is re-
 cleared to him where there is a residuum as being
 due to him according to the Old Law, & should a
 Legacy be given him & still a residuum, he would
 be obliged to distribute the value of the debt among
 the next of kin. An administrator may be a
 witness in any action concerning the Estate of the
 dec'd on the ground that he is trustee to the next
 of kin - But an executor, tho' acknowledged to be
 a trustee, ^{having a right to the residuum} cannot be a witness, because it is said
 he is interested. In Con. he is consid^d as ~~an~~ barely
 as a Trustee.

Lect. 9. One case under Equitable assets was omit-
 ted in the last Lecture - if a man devise Land
 to an indifferent person in trust to be sold
 for the payment of his debts, such Land
 are consid^d Equitable & not legal Assets. Had
 they been thus devised to an executor they would
 have been legal Assets ^{& priority of rank would then hold}. In case the devisee
 will not sell the Land Chancery will com-
 pel him & then there is no priority in rank
 as to creditors, the assets would be averaged. But
 if the devisee sells the Land voluntarily & ap-
 plies it to the payment of debts, there is no law
 compelling him to observe any priority. He
 may ^{pay} simple contract creditors as soon as Special

Duty of an Executor as it respects Legacies.

There are 2 kinds of Legacies viz. Specific & Pecuniary — If there is not personal property sufficient to pay off pecuniary Legacies they are abated proportionably —

But Specific Legacies are never abated, they being of such a nature that it would be improper to abate them & sometimes impossible —

Legacies are frequently given by implication — The intention of the Testator is to rule when it can be discovered without & it is not necessary to observe a fixed set of words —

"I desire" or "I request &c" are sufficient to establish a Legacy; or "I bequeath besides my cloak a hat &c" the cloak is a Legacy tho' not mentioned any where else in the will. When Spe-

cially creditors have exhausted the personal estate, Legatees may fall upon the realty. as we have seen simple-contract creditors might — if lands are devised for the payment of all debts & creditors have exhausted the per-

sonal estate Legatees may stand in the place of creditors, for where lands are devised for the payment of debts, it is ^{presumable} the Testator meant the Legacies should be paid out of the personally.

Salk. 516.

3 B. Mon. 322.

There is a further division of Legacies into Lapsed & Vested. A Legacy is said to be Lapsed when the legatee dies before the Testator etc. The charge
 826. Legacy is not transmissible to the Representative
 2. M. 86. time of the Legatee; but reverts back into the personal fund & if there is a residuary legatee it vests in him otherwise it is undisposed of & the Testator dies intestate as to such Legacy. Legacies however are not always Lapsed when the legatee dies before the Testator. A Legacy
 3. M. to one "to be paid when he attains the age of
 203. 21 years" is not Lapsed if the legatee die before that time. This is a vested legacy & will go to the Representative of the Legatee in case he dies. If however the Legacy had been given to one when he attains, or if he attains 21 (without the words "to be paid") & the Legatee dies before that time it is a Lapsed legacy. But if a legacy is given to one when he attains 21 & directed to be on interest; it is a vested Legacy. This new distinction was taken from the civil Law, introduced into Eng. by the Ecclesiastical Courts, & adopted in Chancery only on account of its connection with the Ecclesiastical Court. Many circumstances unite to show that Chancery is not pleased with this distinction.

If a Legacy is charged upon land, tho' the words are "to be paid at the age of 21" yet if the Legatee dies before that time, it is a Cap-
 sed legacy. In other instances ^{Ex parte} they have varied from this distinction. — When it can be collected from the words of the will that inde-
 pendent of those terms "to be paid" &c. that the testator meant the Legacy should go to the legatee, it is vested, as if the legacy be given on interest at 21 &c. Thus where it is given over
 on the event of the death of the Legatee it is a vested Legacy. — It has been a great Question
 whether a repetition of the same Legacy should be construed an accumulation or a mere re-
 petition? The rule now is established, That
 where the Testator devises a Legacy of 100^l forms. & in the same will, to the same person & in tot-
 idem verbis devises another 100^l it shall be con-
 sidered a repetition merely & the legatee shall have only 100^l. The presumption being that
 it was a mistake of the Testator or scrivener.
 But if 100^l is given to a man in the will & 100^l in a different instrument as a Co-
 dicil, it is not consid^d a mere repetition, but 200^l will pass to the Legatee. If it is evident
 by the words of the testator that he designed the legatee should have both, as if after the 1st
 he should say "for the further provision" &c. both good.

2 Atk. 329

3 P. W. 11

2 P. W. 610

1 Brown
Co-
Chan. 6
38

Estate of Dec^d Persons

If different sums are bequeathed it is not then are not consid^d the same bequest, but both good. & if 1000 £ is given in timber, another in Cattle, another in land &c they are all good.

It was formerly held that when a man gave a legacy to a creditor the legacy should go in satisfaction of the debt. Judges have ~~now~~ refined so far upon this principle that it is at length refined to nothing & an opposite principle is established in its room. We will give a slight sketch of the progress of this reformation. A Century ago it was an established maxim in Chancery that if the testator was indebted to a man 100 £ for inst^l & in his will devised him a legacy of 100 £, this was to be in satisfaction of the debt - going upon the presumption that the testator must mean it as a paym^t of the debt. Many cases were decided under this maxim & it was carried to an unwarrantable length in the Case of Grammer, where the debt was contracted subsequent to the making of the will - the legacy was held to discharge it. Another circumstance that gave rise to this construction was that where a man covenanted to settle a portion on his intended wife & afterwards devised her a portion to the same amount, both portions could not pass it being fairly presumed that the testator had performed his covenant.

The Chancellor not relishing this rule laid hold of every circumstance to evade it.

The first case in which they attempted to break in upon the rule was where a legacy was given to a Creditor of a greater sum than the debt due to be paid in ^a different species of property from the debt. To evade the rule in this case the Chancellor presumed the legacy could not be intended as a satisfaction of the debt, it being of a higher value & not *ejusdem generis*. Several cases were determined under this principle - A case soon arose where the legacy was of the same amount with the debt & *ejusdem generis*, the debt however was payable 6 months before the legacy. This circumstance was laid hold of & it was presumed by the Chancellor that the Testator designed the debt should be first discharged, & the Legatee entitled to the legacy.

A 3rd Case came up where the legacy was to the same amount, *ejusdem generis*, & payable at the same time. It is curious to observe how Chancellors have ~~cracked~~^{racked} their inventions to evade an absurd maxim which might have been broken up at once without all those often ~~possible~~^{possible} pretences. The Chancellor on this case had recourse to the common expressions in the will, "after all my just debts are paid" he concluded

Estate of Dead Persons

that this debt should be paid amongst others & after this the Legacy ought to be paid.
~~But in fact the Legacy was paid~~

A case afterwards came up in which the Legacy was payable at the same time with the debt & to the same amount, & there was no clause "after all my just debts are paid" But the Legacy happened to be given to a bastard & *mirabile dictu!* the Chancellor observed that "as there was no precedent relative to bastards", he should be favored. & thus was the rule evaded.

Another case came up stripped of every circumstance that had heretofore been laid hold of. In this instance the Chancellor broke thro' the ridiculous restraint which had so long fettered former Chancellors & boldly declared that unless something *positive* could be found in the intention of the Testator that the Legacy should go in satisfaction of the debt, the Legatee should be entitled to both sums. And in order completely to destroy the rule, the Chancellor in another case declared that unless *direct* expressions were made use of by the Testator, that the Legacy should go in satisfaction of the debt, it shall be presumed that he meant to make another provision for the Legatee. Our Courts have determined in favor of the Legatee. One curious case

came before our Court in ~~which~~ all the
 one attended with all the circumstances
 which had been laid hold of by the English
 Chancery. A man gave a legacy to his bas
 tard daughter & before that he had given her
 a deed note of the same sum &c. she took both.

Authorities for the above history

1. <i>10 Mm</i> 410.	2. <i>4 H.</i> 300	1 <i>Therby</i> - 521.	In <i>Therby</i>, the decis. seems to be clear that the legatee's not carry interest & not that is not the legatee's of the law. See <i>Therby</i> 10. 1st after Feb 7. 10th
2. <i>10 Mm</i> 616.	3. <i>9°</i> 96	1 <i>Brown</i> 129.	
2. <i>9°</i> 5/5.	2 <i>Therby</i> 409.	<i>Do</i> 235.	
3. <i>9°</i> 229.	2 <i>Do</i> 636.	<i>Do</i> 125.	
		<i>Do</i> 389.	

~~The following ought not to have been inserted in your law
 The general principle is that when a debt be
 comes due it is to carry interest whether it is upon a
 interest in the terms of the contract or not~~

A Legacy given payable at a future time is not to
 be consid. on interest till it is due & not then unless
 commanded by the Legatee. *Salk* 415. This is a gen-
 eral rule liable to an exception. As if a minor
 has a legacy given him by his Parent, notwithstanding
 it may be expressed in the will pay-
 able at a future time, it is to carry interest
 from the death of the Testator unless other pro-
 vision is made in the will for the minor's main-
 tenance. The interest is to be consid. a provision
 for the child till he comes of age, unless other
 provision is made. This however is not the case
 with a Legacy from a Grandparent. 2 *Vent* 346.
 2 *Atk.* 329. 3 *Atk.* 101.

Where no time is limited

In case of a legacy & no time specified this dis-
 tinction obtains between infants & Adults.

Estate of Deceased Persons

VIZ. a legacy to an infant is ^{to begin to} carry interest in year after the Testator's death whether it is then demanded or not; but a legacy to an adult is ^{to} carry interest after a year provides he demand it at the year's end. Otherwise not till demanded, & as the case may be, not till a bill is filed by him in Chancery.

To these principles there are exceptions. When a legacy is of such a nature as to carry interest of itself it must carry interest from the death of the Testator, let it be given to whom it may, demanded or not demanded. As bonds &c that are upon interest, or a legacy charged upon lands upon which rents & profits are arising in all such cases the legatee is to receive interest. — In 3 P. Wms 126 is a case where an infant daughter had a legacy given her by her parent payable on her marriage & no other provision was made for her, she married & her husband being ignorant of the Law took interest only from the time of marriage & executed a release of all demands for the Legacy, he afterwards filed a bill in Equity & obtained ^{interest} from the death of the testator on the principle laid down above. This is a striking instance among many others where ignorance of the Law will ~~suffer may be an excuse~~ is a ground for avoiding a contract notwithstanding

Where notes are given payable at a certain time they carry interest from that time without demand. This by decision sup. Court

the sacred maxim of the Eng. Law "That ignorance of the Laws shall excuse no man".

What becomes of the interest which the legatee is not entitled to by reason of his failure of demanding the Legacy? If there is a residuary legatee he takes it. If no residuary the Executor will take it as residuary Legacy in case no legacy is left him. But if a legacy is left him, it sinks into the fund of undisposed property & as to that the Dec^d is intestate. Of Specific & Pecuniary Legacies.

The first is where a particular article is specified as such a horse, such a Bank bill &c and may be a quantity of money in such a draw. There must always be a particular thing specified with a particular description. A Pecuniary legacy is where a sum of money is bequeathed. ^{Generally} As to the executor's right over the legacy it makes no difference whether the legacy ^{it} is specific or pecuniary. The specific legacy does not vest in the legatee unless with the consent of the Executor, but when the Assets are sufficient to pay other debts, the executor is accountable to the specific legatee for the value of the legacy. If the executor is sued for a debt of the Testator & a specific legacy is taken & sold for the debt, the executor is accountable to such legatee for the value of the legacy in preference to pecuniary legatees. When all the Assets

Estate of Deceased Persons

are exhausted for debts & the Executor, being called upon by a Legatee, pleads plene admistravit, if the Legatee wishes to prosecute the Executor for misconduct or wasting the Estate, he will reply over to the executor's plea a Devastavit & must prove this he may then recover his legacy if the waste ^{was} as much as the legacy, if not, as much as he to the extent of the waste. Suppose the Executor has made no waste, but Specially creditors have taken personal & exhausted the personal fund. The legatees then stand in the place of creditors & if the heir has lands may come upon them to the extent of the Specially debts. After debts are paid Specific Legacies hold the preference to the pecuniary & are to be paid at all events - after the Specific are distributed, & there is not sufficient property left to discharge the pecuniary, what there is remaining is to be averaged among the Pecuniary Legatees - But among Specific Legatees there is no abatement. Tho' some authorities ^{seem} may seem to contradict this idea, yet it is the general principle that is to be collected from the Books. 10th 422 If a Specific legacy is lost, it is the loss of the legatee & he has no demand upon any other property for it, tho' there should be more than sufficient to discharge all

Est. of Dec^d persons

the debts of the Testator - The pecuniary legatee runs no great risk, - for if a house is burnt up & a quantity of money with it, if there is other assets sufficient he meets with no loss - This hazard of the specific legatee is one reason why, in other respects he holds preference to the pecuniary. A devise of land is a specific legatee, - Specialty, and as the case may be simple - contract - creditors may on failure of other property come upon such land legacy - but another legatee cannot. Cases may happen when Legatees may come upon the heir for their legacies, but they cannot upon a specific legatee of land. If however all the landed property is thus devised, the devisee is liable, as well as the heir in other cases. 5 Alk 505. There is one case the peculiar circumstances of which suffer the pecuniary legatee to have preference to specific. Ex. A man gives all his property in legacies specific & then gives to another person 500^l for inst. This pecuniary legacy of 500^l is consid^d as charged upon the specific legacies & the specific legatees must bear the burden equally. - The principle of giving the preference to specific legatees may do great great injustice & defeat the intention of the Testator.

Estate of Decd Persons

as if a man supposing his estate larger than in fact it was should give his children large legacies & then give specific legacies to other persons - Unexpected debts come in & take away from the executor all the property except the specific legacies. In this case the children of the Testator might be left destitute & contrary to the ~~his~~ intention the residuum of the estate go to indifferent persons. When by the Executors consent a specific legacy is vested in the Legatee & unexpected debts come in & there is no estate left to discharge them, what in such case shall be done? if the Executor when he gave up the legacy took a security of the Legatee to refund or care of unknown debts (as he ought) then the legacy is to discharge the debt, otherwise the Executor is to pay it out of his own pocket - but if the Executor had in all other respects faithfully executed his trust this would be a hard case, it would seem reasonable that the legatee should yet refund notwithstanding the executor's neglect in not taking a security. If the executor pays in full a pecuniary legacy, & thinking there was property sufficient to pay all other debts & legacies & there happens not to be sufficient the Creditor or as the case may be ^{as they} legatee must first resort to the ordinary channel the exor

utor & if he is insolvent they may pursue the Assets ~~wherever~~ in the hands of the Legatee that has been paid. The Creditor may compel him to refund ~~wholly~~ the whole legacy if his debt amounts to it, & the other Legatee may compel him to average. 2 Vesey 193. If the executor is able (however unjust it may appear) he must in such case bear the loss, but if he is insolvent, the principle is that the Creditor may resort to Assets wherever he finds ^{them} ~~un~~left in the hands of ~~some~~ ^{any} creditors of an equal or prior rank. There is a case in 2 Vernor 205 where Sec. 11. an executor having taken all possible precaution before he paid the Legacy, was yet excused from paying a debt which came in afterwards.

It is a principle in English Law that where an executor has abused the trust reposed in him by the Testator by making unequal & unjust distribution, Chancery will interfere & compel an equal distribution. As where 400^l was bequeathed to 2 persons & as much if the executor thought fit to a 3^d person. The estate held out & the executor thought fit to give this person nothing, but was compelled in Equity to give the 3^d person 400^l as much as both the others had. Where a Legacy is given to a man's children there has been great dispute

Estate of Dec^d Persons

whether it meant 'To all the children the man had & shall have,' or 'To those which he had when the will is made,' or 'To those which shall be alive at the Testator's death?' It is now established that such expression shall mean "to those children ^{only} which are born at the ^{as these are the only ones} existence at the time the will was made, with whom the Testator could be supposed to be acquainted. 1 Ves 57. If the bequest is to a man's children & ^{he} has none at the time the will was made, it means to all the children he shall ever have - if to 2 men's children & one of them has no children ^{at the time}, it means to all the children of both equally. - A Legacy to a child is sometimes construed to mean ^{to} a child & grandchild. As if a legacy be given to A's children & A is a widower & has no children, it may go to his grandchildren. - An ^{estate} Legacy given to B. for life with a remainder to the heir of D. who when the will was made was C. & B. died before ^{the} Testator, then D. became heir to D. It has been an important question whether the Representative of C. should take the Estate or D. Whichever it may be as to D. it ought to be consid^d as a lapsed legacy with respect to C.

Where a legacy is given by a Testator "to his relations", there has been some doubt what

relations shall have the benefit of such legacy? but it is now determined that those only shall take who are authorized under the Statute of Distributions. 2. Vesey 527.

In a general devise of Person^s & prop^{ty}. that which is acquired after the making of the will may pass to the Legatee. This however is not the case with real property. When all the personal property at a particular place is bequeathed - under such bequest all the property passes which was at that place at the Dec^d. of the Testator - unless it can be gathered from some circumstances that the intention of the Testator did not extend to a particular article - as where a man bequeathed "all his goods, chattels, furniture & such things" on such a farm. There happened to be a large sum of money in a drawer in a house on the farm & this was said not be included in the legacy, as the Testator went on to specify the articles & had not mentioned this most important of all.

What may be consid^d. an ademption of a legacy?

This is a Question that chiefly respects Reg^{ular} Specific legacies. In case a bond is

Estate of Dec'd Persons.

given by a Testator & is collected by him before his death; this may, or it may not be considered an ademption, as the circumstances of the case are, - if it appears that the Testator at the time he collected the Bond was straitened for money, or if the obligor was like to become a Bankrupt, or if the Bond was discharged voluntarily by the obligor. neither of these cases would be consid^d. an ademption of the Legacy. But if it can be collected from ~~any~~ ^{any} act of the Testator that he meant when he took up the bond that the Legacy should be destroyed, ~~from~~ it would be an ademption.

There is another set of cases where legacies are said to be ademed. Where specific Legacies are lost they are the Loss of the Legatee & the legatee has no demand on the estate to make up for this loss. There is a curious instance mentioned in the Books where a house was devised & before Testator died it was so repaired that there was no part of that house to be found which was given at the time the will was made. There does not appear to have been any decision in this case tho' from a principle laid down by the judge in a succeeding case it may be discovered

If the house had been destroyed & a new one built it would be an ademption but it was repaired it might be ademption.

that the house would not have passed to the Legatee. This was the case of a vessel which was (after the will was made) repaired so that nothing but the Keel remained. The Keel saved the Legacy. The judges easily identified the vessel by means of the old Keel tho' had it not been for this, they said the Legacy would have been lost. A Legacy of a mill, tho' it had been all repaired away, would pass for the Court might easily identify it if there was not an atom of the old mill left.

Legacies may be adeemed where there is no loss, as where a Testator in his will made provision for persons, & unexpectedly living long after made the same provision ^{in his life time} for these persons as he ^{had mentioned} made in the will. This however might not be consid^d as an ademption, if the Testator had increased his property after the will was made & it appeared that he was fully able to make this after provision besides the provision in the will. Adjudications in such cases are meant to comport as much as possible with the intention of the Testator.

Legacies are frequently given with some condition. & this is generally respecting marriage. As "if a person marry with the consent

Male of Dec^d Persons

A legacy given to a girl provided she marries with such a ones content & she marries without his consent is considered a restraint on her freedom and is void if it did over to another in case she marry without his consent such conditions are void & affect

of parents" or if a girl does not marry a man of a particular profession, as a Lawyer, or priest &c. such conditions are ^{almost} universally considered void as being against Policy & unreasonable. There is only one exception - as where a husband gives his wife a Legacy on condition that she does not marry. The reason why the ^{law} is so indulgent in this case is that the husband's children may not be so likely to be taken proper care of in another family. When however this reason ceases, when the husband has no children, such legacies would pass tho' she should marry. The Testator's whim is sometimes indulged where it is of trifling importance, as if he gives a legacy to a girl on condition that she does not marry in York, for it would be easy for her to go out of York & marry; but all restraints, where the interest of Society is in any way concerned, are void. ~~A Legacy to A. limited over to B. on A's marriage is forfeited by his marriage & will go to B.~~ When an executor has a legacy in his hands for a minor, he must not give it up to Parent or Guardian unless by rule of Court. If he does deliver it up to Parent or Guardian

without leave of Court he is liable to pay it over again in case the Parent &c should happen to be Bankrupts. The Executor may be compelled by Chancery to deliver up the Legacy to the Guardian &c but unless by leave of Court he ought to keep it till the minor comes of age 10th Mar 285. If a vested legacy is given & the Legatee dies before 21. Question. Ought the executor to pay the Legacy before the Legatee would have arrived at 21? He ought not unless the Legatee had children whom it was necessary to support - or in some particular case. - A vested legacy given to A. and on his death to B. If ^{married or} ~~A~~ arrived at 21 & died after that B would be excluded it would go to A's representative. ^{& unmarried} but if A had died before 21, then it would have gone to B. Sec. 12.

Formerly Legacies were recovered in Ecclesiastical Courts, but now the Court of Chancery has a concurrent jurisdiction with them & in some respects the

Estate of Deed Persons

Jurisdiction of Equity is more extensive than that of the ecclesiastical Courts. As where a Legacy is given in land the ecclesiastical Courts have no cognizance, these cases are the province of Chancery.

Cro. Jac. 364. 279. Parmor 120. Cro. Car. 16. Courts of Law have cognizance sometimes over a certain description of Legacies. As where lands are devised to A. & a Legacy is charged upon it for B. 2 Salk. 415. LeRaymond 947.

Of the Statute of Distributions made in the Reign of Charles 2nd

The Principles in this Stat. will apply to all the United States & if understood, will lay a foundation for a complete knowledge of the Distribution of the Estates of intestates. Anciently in Eng. the method was to divide the Estate into 3 parts a rati onabilis part to the widow & another

Estate of Dec. Persons

69.

To the children. The residue was taken by the ordinary (who then administered) for the good of the poor, the Church & the soul of the intestate without liability to account for the management of it.

Thus the ^{popish} ~~Roman~~ Clergy took a third of every intestate's estate, without even paying the lawful debts. To check these enormities several statutes were made abridging their powers, till finally the administration was taken out of their hands. The Bishops however still appointed Administrators but were obliged to appoint the next of kin. The Administrator frequently abused his power & there was a great part of the estate over which by determination of Courts he had uncontrollable power. This gave rise to the Stat. of Car. 2. which is no more than a revival of the old Saxon Law. This Stat. regulates the distribution of the purplifage of intestate's estates ^{22/3 to them -} $\frac{1}{3}$ must go to the widow if there are children, & $\frac{1}{2}$ ^{to her} if there are no children & the other $\frac{1}{2}$

Estate of Dead Persons

to the next of kin or their representatives. If there is no widow the whole must go to the children or their lineal descendants *ad infinitum*. If neither children nor widow the whole must be distributed among the next of kin in equal degree & their representatives - no representatives being admitted among collaterals further than the children of the Brothers & Sisters of the intestate. In computing the degrees of propinquity the civil law computation is adopted. Courts have adhered pretty strictly to this, tho' they have departed from it in one or two instances which we shall mention.

Table for computing the Deg. of propinquity.

G. Grandfather 3 rd Deg.	G. Uncle 1 st Deg.
Grandfather 2 nd Deg.	Uncle 3 rd Deg.
Father 1 st Deg.	Brother 2 nd
Intestate	Nephew 3 rd Deg.
Son 1 st Degree	GrandNephew 4 th
GrandSon 2 nd Deg.	

If there were two Brothers & one died leaving children, the children stand up with the living brother & take *per stripes* what their father would have taken - Both brothers dead leaving children, they no longer take by representation, but in their own right & the Uncles in the 3rd Deg. will take with them *per capita*. Grandfather & brothers do not take equally.

Same Relatives, only one Brother dead leaving childⁿ

Ans. His childⁿ take per stirpes -

2. All the Brothers are dead leaving childⁿ in unequal numbers.

Ans. The G. Father takes the whole

3. The Grand Father is dead & Aunt living.

Ans. The Aunt & nephews take equally -

4. One of the nephews dead leaving childⁿ

Ans. The Aunt & the surviving nephews take equally the G. nephews being beyond the 3 degree take none.

5. All the nephews dead leaving childⁿ

Ans. The Aunt takes the whole -

6. G. Father again alive

Ans. He takes the whole

7. G. Father dead & Aunt dead leaving childⁿ

Ans. Her childⁿ & the nephews' childⁿ take equally per capita -

8. The Brother is living & nephews

Ans. The Brother is kept down to the 2^d degree & consid^d as the old stock, that the nephews may take per stirpes what their respective parents would have taken -

9. The Aunt is alive -

Ans. The distribution as before - she takes nothing -

10. No Relations but nephews & some of them of the half blood -

Ans. All take per Capita - Finds

Case determined by the Law of
Distributions Permodestate

Quest. 1. J. S. died intestate leaving childⁿ Tom,
Dick & Sally

Ans. Tom, Dick & Sally take equally

Quest 2. Tom is dead leaving son A. Daught^r C.

Ans. A & B. take per stirpes what their father
would have taken

Quest. 3. Tom Dick & Sally are dead. Tom's childⁿ
as before, Dick left C. & Sally D. & E.

Ans. All the childⁿ take equally per capita

Quest. 4. Not only Tom is dead, but his son A
leaving C. & D.

Ans. C & D take per stirpes what their father
A would have taken.

Quest 5. There are no childⁿ but a Father,
Mother & 3 Brothers

Ans. The Father takes the whole

Quest. 6. The Father is dead of bar²

Ans. The Mother by the Stat. would take
whole, but the Stat. of Jac. has degraded her
from her rank to the 2^d degree that the
thers may share equally with her

Quest. 7. J. S's Grand Father is living

Ans. By Stat. he would share with the Bro.
but he is excluded by Courts so that the
distribution is as before

Quest. 8. Same relatives, but the mother is de.

Ans. The Brothers take equally

Estate of Dec'd Persons

71.

In this case the Grandfather is excluded by Courts, tho' contrary to the Stat. of Car. By this Stat. if the father was dead his wife would take to the exclusion of Brothers & Sisters. Finding that this would frequently carry the estate of the intestate into other families by her marriage,

The Statute of James steps in & degrades her from her rank ^{to the 2nd degree} & suffers the Brothers & Sisters to take with her - but as soon as the Brothers & Sisters are dead she is said to resume her rank, this however is only to the exclusion of ^{the} Grandfather, & ~~Grandfather~~ for she is by the decisions of Court kept down to the 2nd degree when the brothers are dead & consid^d as the old stock that the children of the Brothers may take by representation what their Father would have taken. There is no distinction ^{1. Vent.} made by these Statutes between the whole ³¹⁶ blood & the half blood. The enquiry is not which of the relations has the most of the intestate's blood in him? but Propinquity is the only thing to be looked for. ³²³

1. <u>Apr</u> 25.	30 <u>Apr</u> 49.	Charge 710.
— 574.	1. <u>Alk.</u> 458.	Salk — 38.
2. <u>Dec</u> 51.	1. <u>Very</u> 150.	— 351.
— 50.	— 393.	2 <u>Very</u> 213.
— 48.		1 <u>Vent.</u> 323 316
— 344.		

Loc. 13
Feb.

Estate of Dec'd Persons

Of the Advancement of children by the Father

It is a rule in law that where a child is advanced ~~by~~ by his father, he shall not be entitled to a distributary share under the Stat. unless he throws the property advanced him into Hotchpot, that is unless he puts the property he has received into the Common stock. That all may take equally he has his choice either to bring it into Hotchpot or retain it & run the risk of the others having more than himself. As to what may be consid. an advancement it has been determined by a set of adjudications. The child must have been actually furnished with property for his future support. Occasional presents to a child are no advancement.

Where the father has advanced any considerable sum for the education ^{of the child}, if it was as much as he is able to give his other children it may be questioned whether the child could come in for his distributary share, tho' the current of authorities are against education being consid. as an advancement. Money paid out to a Master for a child learning a trade is consid. no advancement - for it said to be only hiring the Master to keep

Estate of Deceased Persons

73.

him instead of the Parent. But where the Father buys an office for his son, tho' but at will, as a Commission in the army & the like, or where the Father makes a provision for his child by a marriage settlement, there are advancements. Where the child advanced is dead leaving children the same rule obtains. This doctrine is confined entirely to an advancement made by the father, for if the child is advanced ever so much by any person except the father, by any collateral relations, by a stranger, or even by the mother ^(20m 356) out of her separate property he is notwithstanding entitled to his distributary share. For it is said in 20m 356 that the Statute does not contemplate an advancement by a Mother, it only speaking of those who could have a wife & children & that the Mother could not have both was a clear case. There is no case in Eng. or Con. where an advancement by a Mother has been made during the life of the Father has deprived the child of his distributary share, & yet it has never been questioned that a mother surviving the father & dying intestate is within the Stat. as well as the father.

Estate of 2^d Dec^d Persons
Of a Will without an executor & what is the care
is where there is no will —

If a will is made without any executor appointed, administration is granted ex testamento annexo & the administrator is vested with the power of an Executor. But where there is no will the Administrator is appointed by the ordinary & is to distribute as the law directs. The ordinary may not appoint whom he pleases, - his duty is pointed out by the Stat. of Edw. 3 & H. 8. He may appoint the widow, or next of kin or both - if there are 20 ^{collaterals} who are nearest of kin & of equal degree he may appoint all of them, or select any one he pleases - or he may grant administration to one over one part of the Estate, & to another the administration of another part. It is to be remembered however that there are joint adm^{ns} & the act of one ^{does not} bind the other. They must sue & be sued together. In ^{over} case one bond, or one article there must be only one Admin^r. If persons in the ascending & descending line of equal degree claim admin^{tr} the ordinary cannot select whom he pleases,

Moll.
 908.
 Bulke.
 36.

but must prefer those in the descending line. Black.
as if the father & son claim, the son is to be ^{504.} preferred. It has been a question whether the
½ blood could be admitted to the Admⁿ as soon
as the whole, but determined they may then
standing in equal degree in the Scale of Pro-
ximity. When a sister of the half blood & a bro-
ther of the whole blood claim the ordinary may
elect whom he pleases (B. Com. 505.) Unless the fe-
male be married, for in this situation she is
excluded in all cases. The next of kin in such case
would not be appointed, for the admⁿ would fall
immediately on marriage into the hands of her
husb. If an infant is next of kin & no other is
older he must be appointed, with another person
to administer durante minoritate which lasts till
the minor is 21. Ab. 251. Tho' an inf^t may be an
executor at 17. — This admⁿ during minority
may be any discreet person. — If the next of kin
all refuse to Administer, the ordinary must
appoint a Creditor, if there be any one who is
a discreet person, & if Creditors refuse he may
appoint any person. — If the Admⁿ die before he
completes his admⁿ, his admⁿ nor exec^r can finish
the admⁿ but an admⁿ de bonis non is to be ap-
pointed & proceed to complete what the former

70. If there are 2 adm^s both must execute releases, but otherwise
last to Ex^t

Estate of Deid Persons

adm^r had begun. The case is different when an
his office descend, to his ex^r if he appointed one, otherwise not
executor dies. When 2 Adm^s are appointed &
one dies his admⁿ survives to the living Adm^r.
The first thing the Adm^r is to do is to go before
the ordinary & there give a sufficient bond that
Sec^d he will administer faithfully. - Our Stat. is a
copy of the Eng. by which the Adm^r is directed
"To make out a true inventory of all the goods
" & chattels of the intestate by such a day; to ad-
"minister such goods according to Law - and to
"make a due return of his Admⁿ at such a day
"and ^{to pay over} the residue ^{of the} estate as the Court directs.

It is the general received idea upon the construe-
tion of this Stat. that the bondsman is bound
for the Adm^r that he make due admⁿ of the goods,
That if he will not pay the debts as the Law
directs the bondsman may be sued. And this is
not the true idea & cannot be supported by au-
thorities; neither was it the intention of the Le-
gislatore; but the only person liable in such case
is the Adm^r & for misconduct he is liable to be
displaced by the Court. The nature of an Admⁿ
bond is not that the Adm^r pay the debts or to
secure the Bankruptcy of the Adm^r. But the
words "to administer ~~to administer~~ truly accor-
ding to Law" mean, that the adm^r return a true
& perfect account of his administration.

State of Debtors

A creditor cannot sue the bond & assign as a forfeiture that the Adm^r has never paid him his debt - or assign and avowit as a breach for this might be done in an action against the adm^r. But as the inventory exhibited is evidence of what estate he had, it determines the question on plene administravit, & if the inventory prove false the bond is forfeited. As if a man dies worth £100 the adm^r makes an inventory of £300 only & carries it into Court - a creditor sues upon the bond - he is concluded by the inventory. But if the adm^r proceeds to pay out the £300 & the debts are not satisfied, the remaining creditor may sue the bond & assign as a breach that all the estate was not inventoried. Suppose again the adm^r has carried in a true account of the estate & will not pay the creditor, the creditor cannot maintain an action upon the bond but must sue the adm^r. If the adm^r has committed a Deceit by acting indiscreetly - the creditor sues on the bond & assigns this as a breach; he cannot recover because the Adm^r is still liable & cannot protect himself by a plea of plene administravit. The creditor is to run the risk of a deceit & not the bondsmen.

The expression in the condition "That the residue after debts are paid shall be distributed among

77. The condition is chartered down as the bond being by force of the Statute. The condition however must be made to have the same effect as the bond being by force of the Statute. The condition is a charge on the bond.

Estate of dec^d Persons

The next of kin as the Court shall direct means no more than that the Adm^r after a reasonable time shall make a proper distribution ^{to the next of kin} if he does not the Bond is liable for the next of kin can get at the estate ^{in the hands of adm^r} only by distribution; but it is otherwise with the creditor for he can pursue the assets wherever he finds them.

The Adm^r is to make out the inventory by a certain time & if he does not the Bond is forfeited. It is to be remarked however that the bond is only liable for what is called the frank money that is for the disappointment of the creditor in consequence of the adm^r's failing to make the inventory as the Court directed. The bond is only affected as to this transaction as to all others it is good. The bond may be sued, by as many as are injured by the breach of it, at different times. For it remains in the Office in the hands of the ordinary in Eng. & probate in Com. If the debts are all paid & any property has been left out of the inventory so that the next of kin are injured, the bond is forfeited. So if he has made out the distribution & will not exhibit it to the Court, the bond may be sued. And if the Adm^r the moment he is sued carries in the inventory, still the bond is forfeited as to this transaction & small money may be recovered

None is administered as not a leg in Cornett, except in one case that is where there is only one next of kin, & the property each credit by one leg. If there is any other property each credit by one leg. One adm^r must have his averaged sum, One adm^r must have his averaged sum, One adm^r must have his averaged sum.

Ex^r may do any act before probate of the will except by bringing a suit.

Estate of Dec^d Persons

In Con. when there is not property sufficient to pay all the creditors, the object of the Law is to average it equally among them. & if the Estate average no more than 10s on the £ & there is still any of it left out of the inventory, the creditor cannot sue the bond & recover the whole debt as he may in Eng. He may compel the Adm^r to exhibit all the property & this will be averaged again among all creditors.

Revocation of Adm^r power

The authority given by the ordinary may to the Adm^r may be revoked tho' the Ordinary is not at liberty to revoke unless for some reasonable cause. as if a will is discovered with an executor, or if the Adm^r become incapable of performing his duty by reason of lunacy, or run away - in such cases the ordinary may make a new appointment. - But when a new adm^r is appointed what shall become of the adm^r of the former adm^r when the former adm^r had become incapable or run away, his acts are bind^g upon his successor. but when a wrong person has been appointed, his acts are void; or when a will is found, the Law is now different. the acts of a wrong adm^r are as binding as those of a right lawful one on the ground that he is to render an account of his adm^r.

and if he has money in his hands raised by the sale of lands, the sale is good & he is accountable for the money. Suppose he has Cattle &c in his hands they may be recovered in an action of Trover. If an adm^r has been appointed where there is a will & has obtained judgment against ~~some~~^{any} person & the debt not collected, the executor under the will may bring a *seire facias* upon that judgment in the same manner as if it had been obtained by himself.

Locke's. Of the Right of the Adm^r over the property of the intestate.

Gen. Rule. So far as the Adm^r is appointed he is vested with the property of the intestate; he may exercise the same rights of ownership over it, that ^{so far as is necessary to collect & pay debts} the dec^d could be liable to fulfill the same duties. Yet there are certain actions which he cannot maintain which the intestate might & certain actions to which he is not liable, but to which the intestate would have been liable.

1st What actions the Adm^r cannot have
* Formerly no action of trespass for injuries to personal property could be maintained by the Adm^r for it was said the right of action died with the intestate. A Stat. of Edw. 4th however was made which gave the Adm^r a remedy

If a test has expired, the property of the intestate, the adm^r may bring an action, but not for other torts.

Estate of Dead Persons

against the intestate has occasioned much confusion in this subject. ^{See this case.} Cowper Hamley & Trot-

To find out where the adm^r ~~will~~ is liable for the Contracts of the intest. & where not observe the following rule - "Where the intestate would have been liable for a breach of a trust which would not have benefited him had he performed it." In all such cases the adm^r is not liable as where a Sheriff suffers an escape, his adm^r is not liable Roll 921. l. 1. Sams. 218.

The Adm^r must sometimes sue in his own name as adm^r; at others he ~~must~~ ^{may} sue in the name of the intestate or his own. In all cases ~~where~~ ^{when} ~~act~~ of debts that arose in the ^{lifetime} of the intestate; the adm^r must sue in his own name; but just as arose after his death he may sue either in his own name or that of the intestates. A creditor who is appointed adm^r is in general ⁱⁿ no better situation than other creditors - creditors of a superior rank will take before him - he has the preference among those of equal rank. An administrator in Eng. has nothing to do with land, ^{as a general rule} ~~generally~~ nor appendages to the Land - as Rabbets in a warren, or deer enclosed in a park. Leases for years go to him - When however land is extended for the payment of debt it vests in the Adm^r.

* To make the adm^r liable the contract must arise not out of the intestate's contract, but from the credit or from the person in whose favor the trust was held.

There might be a curious question, What becomes of an estate per auter vie? It cannot go to the heir for there are no words of inheritance in the grant. And the Exec^r cannot take it because it is a free-hold. Before the Stat. of Charles (which gives it to the Exec^r) such estate in Eng. went to the first occupant, after the death of the intestate. But as that Stat. has no operation in Con. it is doubtful who would take such estate here.

Of Emblements some go to the heir & some to the adm^r or Exec^r. Natural grass & fruits go to the heir. But all artificial emblements such as are raised annually by cultivation go to the executor. Stones, Hatters, Kettles &c. originally went to the heir as being fixed to the freehold by too large a nail to be removed. Now any thing that does not properly belong to the freehold may be taken off & if any injury is done the freehold the executor ought to pay damages. 3. H. 23.

Heir. Looms as Monuments of the ancestor & coat of arms - & a chest where deeds have been kept, go to the heir. Roll. 915.
If the Adm^r mentioned bad debts, for as much as their amount he is not liable. As if he has

Estate of Dead Persons

inventoried a vessel at sea & it is lost he is not liable to the extent of the inventory.
Lech. 16. Originally at Com. Law if a man commenced an action & died, his administrator could not pursue the action, but must institute a new suit, the old one dying with the decd. The Stat. of 1791 & 1804 has pointed out a method to carry on the former suit by suffering the admr to go before the Court & exoner "mortuus" to the name of the intest. & then the action goes on as tho he had lived. When the def. dies also the Plf. may bring a scire facias against the defts Admr counting upon the former action & the cost of the old action is attached to the new &c &c

The Stat. has made ample provision for the cases where ~~the~~ ^{the} Plf. but seems not to have sufficiently contemplated the case of the deft. for where a Plf. has bro't an action without a cause, & died his Admr may or may not pursue the action as he pleases & if he does, & the deft has been put to cost he will lose it. This however would be very unreasonable. The Stat. says the Admr "may enter" & pursue the action now if this could be construed must

The Adm^r would be compelled to pursue the action & the Def^t. would obtain his cost. but a construction would not however be fair.

But in all cases in which the adm^r sues as Adm^r where he might sue in the name of the intestate, he is liable to costs, if there was no ground for the action. The legal estate of a mortgage descends to the heir but the beneficial interest is ultimately the executor's. After the Law day the heir may take the mortgaged ^{premises} if he will pay the mortgage money. This estate is not to be inventoried the money to redeem is to be put in the inventory as far as it comes in.

Executor's interest in the Apprentice.
Of the Dec^d.

An apprentice is not assignable - he was put out for instruction in his trade & as soon as the Master is prevented by the act of God from affording such instruction it would seem reasonable that the Apprentice should be released.

Where Commissioners have rejected the claim of a creditor there being no appeal - but if the Commissioners allow a bad debt the Ex^r may always contest it - The Ex^r may always represent himself if he pleases.

Estate of Dec'd Persons

The Adm^r in Eng. is to pay debts after the following rank —

1. Funeral charges that are not extravagant.
2. King's debts not fines.
3. Debts in last sickness.
4. Debts upon record.
5. Specialty Debts —
6. Simple contract Debts.

Where the Adm^r has paid where no debt was due, he is accountable for the amount of such debt, unless he has acted a reasonable part: His safest way ^{when there is a doubt about the legality of} is to file a bill in Chancery to have all the creditors appear and for such debts as Chancery allows him to pay he is never again liable, tho' they should prove not to have been due. The Adm^r is not obliged to take every legal advantage to avoid a contract as the Stat of limitations. ^{But} there is an authority in Bacon to prove that the adm^r ^{must} ~~take~~ ^{or if it is a devastat} take advantage of the Stat. of usury.

An Executor in his own wrong, is a person who undertakes to administer the estate of a Dec'd without any appointment either by will or by the ordinary. Creditors may sue him & recover to the extent of the property he has in his hands belonging to the Dec'd & must be described in the writ, "The

executor of the Last will & Testament, (Of a person who never made any will). He is sometimes however, described as 'executor in his own wrong'. If he was a creditor he cannot retain ^{money for} his own debt & is in no better situation than if he had not assumed the Office. - There can be no executor in his own wrong where there is a rightful one unless where there has been a fraudulent conveyance, or a Donatio causa mortis. In the former instance viz. where a fraudulent conveyance has been made, the donee is executor in his own ^{for the dec^d obligor} wrong, & is liable to creditors to the extent of such property. In the latter inst. where a voluntary conveyance was made if ^{there} ~~there~~ was not other property sufficient to discharge the debts, the Donee would be executor in his own wrong, for the dec^d.

Of the power of a Testator to limit ~~over~~ his personal property.

By the ancient Com. Law no personal property could ^{be limited to} take place in expectancy, because such property is of so transitory a nature & so subject to be lost, it would tend to stop that easy circulation of property which is so necessary to commerce, & create quarrels

Estate of Decd Persons

if it was suffered to be limited over
 Chattel real may be limited over to any
 persons in esse. A man may also devise
 his lands to one person ^{for life} with a remainder
 to another? Blac. Com. 398. But if personal
 property is given to a man in tail, it vests
 in him absolutely & no remainder shall
 be good. For the Statute is not allowed to de-
 vise an estate so that ^{it may} ~~should~~ tend to a per-
 petuity. A man may give personal property
 to another for life & then to his son. If an
 estate would vest in the son ~~in the next ab-~~
 solutely without tending to a perpetuity. but
~~it would not be to an estate~~ ^{of personal property} to a man &
 the heirs of his body would vest an estate
 in the grantee in the nature of a fee simple.

Lect. 17.
 Feb 17.

Of the Stat. of Mortmain

This Stat. was made to prevent persons from
 making donations to corporations & parti-
 cularly to prevent the ~~property~~ ^{prosperity} of the nation
 from falling into the hands of the clergy.
 After the reformⁿ was established when there
 was no danger of this kind, donations to
 corporations for public or charitable uses
 were decided to be without the Stat. till a
 Stat. of George 2nd intervened & declared

them to be within the former Stat. In this of George however, ^{donations to} the Universities & ~~and other~~ College are excepted - money given to be laid out in lands is also declared to be within the Stat. of Person. Prop. 7.

Wills ^{of Person. Prop. 7.} by persons of non sane memories, drunken persons &c are void. It may be that Wills of Persons born deaf, dumb or blind are good. If it can be made to appear that they ^{they will} saw, or in case of a blind man that the will was read to him & ^{he} ~~they~~ consented.

Wills made under duress are void.

The rule in law does not ascertain how far threats must go to destroy a will. Tho' every case that has come up where there was any kind of duress the will has been avoided.

Where fraud has been practised to turn the testator's intention the will has been rendered void in all the cases Reported except a single one. Fraud in this case was made use of to influence the Testator to destroy a will in which he had conferred his property upon an unworthy object, & in the second will had given the Prop. to his wife & child.

Estate of Dec^d Persons

This was looked upon to be just & pious fraud that the will was confirmed.

Persons guilty of treason or any high crime by which their property is forfeited are incapable of making wills.

It is a maxim in English Law & a very important one, That the intention of the Testator is to govern, if it can be found & is consistent with the rules of Law. If by this is meant that if the will is inconsistent with any form of technical words or worded according to the strict rules of Law & the technical forms, it is good; otherwise not, the equitable intention of the Stat. is entirely defeated. It cannot however be presumed that this restraint was meant to be put upon the maxim. Buller's explanⁿ of it seems to be the true construction. That if the intention was legal it might be executed, even if the technical forms of the Law were not complied with. but if, for example, the Testator had devised a Library of books so that a perpetuity would be created, here his intention might be plain, but just & good being unlawful it is void it being

an unlawful intention it is not binding.

Of the admission of Parol Testimony respecting wills.

Formerly greater latitude was allowed in admitting testimony relating to wills than to other instruments but now there seems to be no distinction - The same rules of admission of Parol proof will apply to all cases - 2 Atk. 372 - Where the ambiguity arises from any extraneous matter, foreign to the ^{Part of the} will, parol proof is admitted. As where an estate is given to a son John & the man happens to have 2 sons by the name of John, parol testimony is admitted to prove which John was meant, or if the Testator has misdescribed the legatee by mistaking his christian or surname, it may be proved by parol ~~that~~ was the person meant.

Of rebutting an Equity - Where legal words convey one ^{by an equitable construction} idea, parol testimony is sometimes let in to contradict that idea by disclosing the intention of the Testator - As where an executor has a Legacy, the law is that he shall not take the residuum, but parol testimony.

Estate of Dec'd Persons

is admitted to show that the Testator intended he should be the residuary legatee. The rule is that where the ambiguity arises from the face of the will parol proof is not to be admitted. There is however an exception to this rule in a case reported in 1 Brown Ch. 172. This has given rise to an equitable rule "that parol proof may be let in to ~~prove~~ ^{explain} facts to give a construction to the ambiguous words in a will.

Requisites for a will of Pers. Prop^y

There must be 3 witnesses to a will of real property - but as to a will of pers^y prop^y no witness is necessary. If it appears that the will is in the Testator's hand writing & his name any where upon the writing it is a good will, sealed or not - or even if his name is not in the will, yet if it is proved to be his hand writing & that the Testator signified it to be his intention that the will is valid. And even if the will was not written by the Test^r. but it can be made to appear by parol evidence that he approved of it, it is good. A will of Person^y Prop^y is the loopest of all instruments.

Almost any person may be an executor, but when persons ^{of} no discretion are appointed they may be displaced - but profligacy of manners does not disqualify a person for the office. An inf^t may be appointed executor ^{let him be very young.} ~~at any age~~ - he is not permitted to act till 17 or exact^r - but previous to that period an ~~ad~~ ^{ad} ~~durante~~ ^{durante} ~~minoritate~~ ^{minoritate} is appointed. Tho' an inf^t may rescind his contracts generally, yet those entered into as execut^r are binding upon him ^{except} &c.

A Legacy to a man's wife is said to be the husband's tho' if it is expressed to her sole & separate use it is her's alone. This idea however breaks in upon the old maxim that no feme covert can own her property in possession. This is certainly ^{contrary to a} ~~a~~ rule of law & we have before seen that if the intention of the Testator is against a rule of law such intention is void. The Courts however have by some method or other evaded the law & the practice of suffering such legacies to be good is a ^{just} ~~reasonable~~ practice - Legacies issuing out of lands given to girls in terrorem ~~on~~ ^{(on} condition that they will not marry a particular man ^{or} ~~or~~ a man in a particular profession in such case

This is a rule of law

Estate of Dead Persons

with the intention of the Testator shall be complied, & the legacy defeated by a breach of the condition. 10th 81. — A donatio causa mortis, conditioned to revert to the donor, vests, immediately ^{very} on the ~~dead~~ death in the donee & the executor has nothing to do with it. 10th 406. This is a question whether a bond such donation must be delivered to the donee personally — a donation of cattle or such a farm is not good in law. It is a question whether bonds are subject to such donation, if this is the case the Executor cannot take such bonds, for if he could it would be discretionary in him whether to give the bond to the donee or not. Such a donation is substantiated in 10th 408. Lecture 18th Febr. 19. 1793.

Of Donative Wills.

There are wills which depend entirely upon oral evidence. At Com. Law such wills were good. But the Stat. of Charles has laid so many restrictions upon them that they have fallen into disuse. The question may make a figure in Com. Whether any donative will would be valid. And if valid how far they might extend as it has been the universal practice to make wills in this country.

to reduce Wills to writing it is very doubtful whether Courts would admit a verbal will. But if admitted as valid, it is very uncertain how what would be their extent, as the Stat. of Car. which puts such close restrictions upon them have no operation in this State.

It is an established principle in the Eng. law that a will of real & personal property altho it be defective to pass real yet may be good as to personal estate. This however is a very unreasonable principle, for the intention of the Testator may be completely defeated by it: & great injustice done to his family. For inst. A man having 6 sons & 6 daughters, devises his real property to his sons & his personal to the daughters. The will happens to be faulty, signed perhaps by only 2 witnesses, - in this case the will is void as to real but good as to the personal prop^y. & the daughters will take the whole personally, & the eldest son all the real estate, so that the other 5 sons would be completely excluded & the intention of the Test^r greatly thwarted. It is easy to see that cases of this kind may frequently happen. It would appear reason^{ble}...

Estate of Decd Persons

that this unjust principle should ~~make~~
 give way to the positive & unerring
 rule That the intention of the Testator is al
ways to govern, unless inconsistent with Law.

We have seen that the Adm^r, before ap-
 pointed by the ordinary, has no authority over
 the goods of the intestate, but the Executors,
 before probate of the will, may exercise any
 power over the property of the decd that he
 can after, with a single exception of suing.
 he can bring no action till after probate, tho
 he may discharge & collect the debts. Before
 he has proceeded to any such ^{act}, it is at his plea-
 sure to refuse or accept of his office, but if he
 has done any act in the character of exec^r
 he must accept. Office of Exec^r 3d. 1 Salk. 301.
 If the exec^r neglects to appear the ordinary
 may summon him before his Court & there
 he may accept or refuse. but ^{if} when sum-
 moned he does not appear the ordinary
 will excommunicate him & administration
 will be granted to one, cum testamento an-
nexo, & in such appointment the ordinary
 need pay no regard to the next of kin.
 In Con. instead of excommunication, the Ex

executor is only fined 5 £ for non-appearance on being cited by the probate Court.

Generally 2 Executors are appointed & if one refuses the other may proceed to exercise his office as tho' he was sole executor but the executor who refused may come in ^{at any} time during the life of his co-executor & act jointly with him. If both accepted a Plf must bring his suit against both - if the one who refused is sued he may plead that he was never executor, but if he has come in & done any act with his co-executor they may be sued jointly. Roll. 1918.

If an executor dies his executor may succeed him in his office & admin^r the property of the former testator - he is ^{not} obliged to accept of this however. This is not the case with the adm^r of an executor, or the executor of an adm^r - they have nothing to do with the adm^r of the former decedent's estate.

Where there are 2 Executors, & one dies, the his executor cannot be joint executor with the original executor, but the Office falls solely into the hands of the survivor. Suppose again the survivor dies, the exec^{ship} will not then go ^{to the} executor of the former decedent's executor but to the survivor's executor. Suppose the survivor dies intestate, shall the office then

go to the exec^r of the original exec^r? No - for the right was solely in the survivor. Office of Exec^r 101. Important question Shall both executors be jointly liable for the Devastavit of one of them? Abstractedly consid^d they are not. As for inst, if one had rec^d a certain portion ^{of money} to administer & it had not ^{come} to ~~be~~ in the hands of the other the one who had it in his possession would be liable alone for waste. Consid^r it in another point of light. They both rec^d money & gave a joint receipt for it - One took it all & committed a devastavit - both are liable for the receipt in the names of both is evidence that it came to their hands jointly. This rule embraces all cases of the kind - Salk. 318. 2 B. Ch. 114. -

The authority in Salkeld makes a distinction between Legatees & Creditors - as in the case last put ~~the~~ Creditor could have his remedy against both exec^rs but Legatees could not only against the one who had committed the devastavit - But the later authority in Brown & Bolles has abolished this distinction.

An Executor is not so liable to be revoked as an Adm^r The ordinary may take away

the Admin^r from an Admin^r for almost any imprudent conduct, a trifling want of discretion, or for being in failing circumstances. But an Executor cannot be displaced for such cause - his discretion must be weak indeed, to be ground for displacing him & he cannot be removed on any suspicion of his becoming a Bankrupt, tho' in such case Chancery may compel him to give bonds. The Exec^r ^{in Cons.} must show the will before the ordinary by swearing ~~that it is the true will~~ that it is the true will of the Testator & if a will of personal Estate only, it is then good provided no one appears to dispute it. If there are Witnesses the practice is to examine them privately & reduce their testimony to writing to show to the ordinary. The Exec^r may cite in the widow or next of kin to certify the validity of the will, if necessary. If the Ordinary refuses to approve of the Will &c he may be compelled by a Writ of Mandamus to appear before the Courts of Westminster Hall & there it is to be tried whether the Exec^r appointed shall proceed to the execution of his office.

Estate of Decd Persons

There are several instances in which admⁿ is to be granted where there is a Will.
 1st Where there is no Exec^r mentioned in the will - in this case an Adm^r is appointed cum testamento annexo

2. Where the Exec^r is a minor - an adm^r is appointed durante minore aetate

3. Where the Ex^r is out of the Kingdom, an adm^r is chosen durante absentia.

4. When there is a controversy concerning Who shall be Exec^r? An adm^r is appointed pendente lite.

- Lecture 19th Feby. 20th 94.

When real estate is devised for the payment of debts, before this is touched the personal is to be exhausted, unless the Testator has directed otherwise in the will. This however is unreasonable, & inconsistent with the principle that the intention of the Testator is to govern, as legatees might be injured if the Creditors were allowed to take the whole personal fund, & this would be manifestly contrary to the intention, the Testator when he had devised real property expressly for the purpose of paying debts. 1 Will. 24. 1 B. & C. 154. The principle ought

to be that, unless the ^{testator} ~~testator~~ ^{signified} particularly that the person's prop^y. should first be exhausted, the prop^{erty} real which he devised for the payment of debts might ~~be~~ should be taken by creditors before they come upon the personally.

If a Testator devise all his debts to be paid debts upon which the Stat. of limitations has run are taken out of the Stat. & may be recovered. The general received opinion That debts revive when taken out of the Stat. is ~~just~~ the true idea tho founded upon false principles. They go upon the presumption that the debt has been paid - & that as soon as this presumption is removed the debt revives - But if this presumption is good a devise that all one's debts shall be paid would extend to all other debts ever contracted by the Testator paid or not, as well as those barred by the Stat. - The Courts of Chancery have introduced a presumption contrary to this by which all the authorities may be reconciled. ^{They have} ~~Chancery~~ taken it to be an existing debt that the Stat was only made to prevent litigation which would arise from suffering debts to lie a long time & the difficulty of ascertaining them, That every man has a right to waive his right to the Stat. & after that he never can resort to it again. A man may take debts out of the Stat.

Estate of Dead Persons

by publishing that he will pay all his debts. It has been supposed, that publishing & devising as above is a promise to pay the debt & that this is the ground upon which recovery is to be had. This is not the true idea for where there is an express promise, the creditor may recover upon the original debt & bring the promise as evidence of the debt. The idea is false for another reason - where a man owns that he owes the debt, this is no promise to pay it & yet this may furnish a ground for a recovery upon the original debt.

The most striking argument against the presumption that the debt has been paid when barred by Stat. is this - A man acknowledges the debt to be due but says he will not pay it, in this case most clearly the presumption is completely taken away for the debtor expressly says the debt had not been paid. When a man acknowledges & refuses in this manner, it is no waiver of the Stat. it shows that he means to take advantage of the Stat. & therefore does not furnish a ground for a recovery. From what has been said it is manifest that the law must presume that the debt was not paid & in this way all the authorities on the subject may be reconciled.

Law of New York respecting the estate
of Decd Persons —

According to the principles of the Eng. law the Real property descends to the heir & the personal to the Ex^r. The real in the hands of the heir is liable both to specialty & simple contract creditors. this feature in the law of New York is distinct from the Eng. principle. The first paragraph of their Stat. relative to this subject is to be understood as the principle of the Com. Law taking in the Stat. of Tamer - it subjects the heir to creditors before the land is aliened it is assets in the heirs hands for the paym^t of debts & after aliened the creditor may come upon the heir himself. Another difference from the Eng. law - the design of the ^{N. York} law is that all debts be paid if there is estate sufficient any where - in the first place the creditor must come upon the person properly & this being insufficient the exec^r may sell so much of the real as is sufficient to discharge the debt - & the deed is to be given by the ex^r or Adm^r & not the heir - It is to be remarked that these principles do not apply where the estate is insolvent.

In case of insolvency the estate is all to be sold & the money bro't before the Chancellor & there averaged among all creditors without any regard to priority of rank. The inventory inventory is to include all the real & personal prop^y in this respect different from the Eng. Law.

Administration to be granted to the next of kin as in Eng. The Stat. of N.Y. is a copy from that of Hen 8.th & the distribution is according to the Stat. of Charles & James with a single exception. a child advanced by his father is not to throw his estate in hotch-pot. what property has been advanced him is consid^d as an advancement without throwing it into the common mass. The Administration bond is as in Eng. — Respecting Legacies, the decision is not before the Chancellor as in Eng. But the Court of Probate in N.Y. is vested with all the authority over legacies which in Eng. is vested in the Court of Chancery & Ecclesiastical Courts. The judge of Probate may enforce his decree by issuing an execution against him who disobeys & confine him till he will comply. By a Statute in their

Estate of Dead Persons

That they have adopted the english mode of enforcing decrees, excepting the infliction of ecclesiastical penalties.

There is another equitable difference from the English law. They have made a provision for the redress of injuries done by the testator, by the ~~Ex^r or adm^r~~ suffering the action to be bro't against the Adm^r or Ex^r.

Respecting the liability of the Adm^r to costs the law is in Eng.

Law of Connecticut

The real estate is said to go to the heir & the personal to the Ex^r. There might however be a question whether ^{this} is actually the case?

For an injury to the realty the practice is for the heir to bring the action & for any injury to the personally the action is bro't by the executors. The title of the heir is defeasible in case of insolvency, it is totally defeated & if the personal fund is insufficient for the paym^t of debts it is partially defeated.

The realty is a subordinate fund the personal must first be exhausted. - In Eng. real property is a fund for specially debts only. - In Con. for all debts, & in N. Y. when the action is not against the heir it is a concurrent fund with the

Estate of Decd Persons

personal estate. Now as in N.Y. all the property Real and personal is to be inventoried & if the personal is not sufficient sufficient to pay debts, the Exec^r may go upon the property in the hands of the heir (with leave of the Court of probate) & sell that till the debts are discharged - but the exec^r must not keep the land himself & ^{even if he} advance the full value of it. This has been determined by a decision of Court. When the heir has sold lands for money, the money is assets & the heir is trustee to exec^r. After debts are discharged the heir is entitled to the remainder of the real estate. Suppose the estate is taken to be insolvent & any injury is done to the lands in the hands of the heir Who shall bring the action for this injury? True the heir may if he chooses but it is not at all probable that he would for the property is all going to be taken from him & he would only subject himself to costs for nothing. This point is as yet unsettled but why ought not the ex^r to take the whole command of the property till the period is elapsed in which he is to administer the estate & then if any thing left ^{of the realty} give it up to the heir. This doubt has been

~~The case was it for our Law~~ in this respect is a little tinged with the Eng principle relative to heirs; otherwise the Exor would be empowered to take the propy as above.

In Connecticut (it is apprehended that) no action can be bro't against the heir, as heir, tho' in N.Y. their Stat. has provided that he may. If the exor has distributed to the heir & a new debt comes in it may be recovered out of the heir tho' not as heir. In Eng. it could be recovered only in Chancery & not at Law. There an estate descended descended to 3 females & they were all sued as heir when a new debt came in, & this probably would be the case in N.Y.

There has been some doubt whether a mortgage descends to the heir or ever ~~at any rate~~ the heir has the nominal interest the practice ^{is} for the heir to bring the writ of ejectment & then he ought to convey it to the Exr. —

Lecture 20 Feb^r 21st 94.

Continuation of the Law of Con.

The exor is liable to be sued in Com. Law Courts as in Eng.

Estate of Dead Persons

The personal property is first to be expended before resort is had to the real. When they are both insufficient for the payment of debts the Ex^r or Adm^r must be careful how they pay debts. They must represent to the Court of Probate that the estate is insolvent if the Ex^r has discharged a debt previous to this, he is accountable for what is beyond the average, but it is apprehended he may compel the Creditor in such case to refund. — As soon as insolvency is represented, Commissioners are to be appointed. They are vested with the power of a Court. They are to accept examine all claims upon the Estate & may accept or reject at their discretion. After the Report of the Commissioners is returned to the Probate ^{the rejection of any claim} it is final & conclusive as against creditors. If Creditors wish to reverse their transactions they must go to the Probate to prevent the acceptance of their Report. The judge if he thinks proper may throwp^{nt} other

Commissioners on the same again I give them his opinion upon the matter. ^{I also appeal} ~~The creditors claim is still rejected~~ ^{may appeal to the Sup. Court} Commissioners are more likely to accept than reject claims - for after they are accepted & return made to Probate, the exec^r is not obliged to pay them, but may litigate with the creditors ~~with the funds of a prob. fund.~~

If the ~~Commissioners~~ ^{Executor or Adm^r} admit more claims to than the estate is worth to ^{a greater} ~~the~~ amount of more than the value of the estate it is represented insolvent. If the estate is solvent, the judge of Probate has nothing further to do - the Exec^r proceeds to administer distribute the estate accord^g to the law. But if it is represented insolvent the judge averages it among the creditors. Government debts, & debts in last sickness & funeral charges are to be discharged in the first place. Then no preference ^{among} to creditors. There is some doubt respecting ~~even that the meaning of extent of the~~ ^{our statute says last sickness & funeral charges} meaning of the phrase sickness &c. whether it extends to all sickness of the De^d or only to the last. Some suppose that as the principle was

Estate of Deed Persons
 taken from the Stat. of George which says
 last sickness, ours ought to receive the same
 construction the contrary idea however seems
 the most plausible that as they had the
 Stat. of George before them the Legislature
 would have copied it verbatim if they meant
 to adopt the same principle. The univer-
 sal practice at present is conformable to
 the Eng. mo^r custom of including the debts
 for the last sickness only. & this is the most
 reasonable practice whether agreeable to
 our Stat. or not. There has been no decisⁿ of Court.

Another difference between our Law
 & the English is that the Adm^r or Ex^r
 cannot plead plem administravit here.
 For if the estate was insolvent it was
 averaged by the judge of Probate & if
 so then the Adm^r or Ex^r must discharge
 a fair debt, in the former case they must
 plead that the estate has been averaged.

If there has been just property sufficient
 to discharge the debts & Legatees demand
 the Adm^r may plead plem administravit
 & all the other principles respecting Legacies
 are the same as those mentioned under the

English Law on this subject.

In Eng. if an adm^r plead plene administravit the Pl^f ^{might} would reply over a devastavit. But in Con. there is no room for such a procedure - for if the estate was represented insolvent the Adm^r has been compelled by the judge of Probate to distribute according to the average made & if the estate was solvent creditors must sue upon the Probate bond. The Adm^r is answerable to the Court of Probate for any waste. Then an average is to be struck -

The leading feature in our law upon this subject is that all creditors, ^{shall have} then equitable parts of the Dec'd persons estate in proportion to the magnitude of their respective debts. It is necessary to mark with accuracy this distinction between our & the English Law for the principle of averaging & a few regulations necessarily arising out of that principle are the only deviations from the Law of Eng. After an average has been struck, a legatee cannot reply a devastavit for the very cir

Estate of Dec'd Persons

circumstance of there having been an average ^{showing} ~~that~~ that the Creditors have not been fully paid & they hold preference to Legatees - & if there had been properly sufficient to pay both the Legatee might sue probate bond.

Another difference from Eng^l Law -

By our Stat. if the Creditor does not bring in his claim to the Commissioners he is barred ^{when an average has taken place} - unless new estate is afterwards discovered. But supposing a creditor in this situation should have a debt of 100£ & the new discovered estate was the same sum of 100£. Could this creditor take the whole? No. a second average would take place & this creditor would take only his share - for if he might take the whole, men would be encouraged to keep back their debts from the Comm^{rs} if ^{no} if they happened to know of some estate of ^{the} Testator's that had not been discovered, & great fraud might take place in this way it would also destroy the ruling principle of averaging.

The Stat. does not say that those who have carried in their claims shall not take advantage of the newly-discovered estate. it only says those who have not carried in may take advantage of it. There is a decision Reported in *Kirby* which was evidently unwarrantable - in which the creditor who neglected to carry in was suffered to take the whole amount of his debt & no second average was made. Suppose the new-discovered estate was worth 1000£ & this last creditor took his whole debt of 50£ What shall become of the remainder? Shall it go to the next of kin, when perhaps the ^{other} creditors have received only 2/ on the pound? The Superior Court, however, ^{in this case no decision yet} in the present case of the kind reversed their former decision & ordered an average. To compel an average resort may be had to the Probate bond. Tho' the best method is to inventory ~~the~~ such new-found estate & if this ^{is} done there is no necessity for suing upon the bond - but if the exec^r refuses to inventory, then sue the bond. By these principles the average Law is kept entire. Mr. Raper tried one case upon this ground & succeeded in the Superior Court.

Estate of Deceased Persons

It is apprehended by Mr. Reeve that in this Country there exists no such character as an execut^r in his own wrong. This is a new doctrine & contrary to the general opinion & that of the Court also. It is ap-
^{prohended} ~~prohended~~ that the existence of such an execut^r would ~~destroy~~ ^{defeat} the counteract completely the intention of the average law - for he would be obliged to pay the whole debt to the first creditor who might demand, whether the estate was insolvent or not - Such a character might here be found as a trespasser - It is true that if an estate was solvent he would do no harm, but if the estate was insolvent the most palpable injustice ^{might} ~~could~~ be done. As thrusters would take advantage of the law & hire somebody to assume the character of an execut^r de son tort & come upon him immediately & recover the whole amount of their debts, when an average ought to take place among all creditors. It is hardly to be supposed that such villainy would be countenanced by our Courts. As long as the Adm^r is answerable to the whole extent of the ^{of the} property, deed there can be no necessity for an execut^r de son tort. If there is any ne-

cedity for such an deed it can only be in the case of a fraudulent conveyance & a donation in contemplation of death - donatio causa mortis. & even if admitted in such instances our favourite & important principle of averaging would again be disturbed - as the creditor who comes first might obtain the whole amount of his debt.

Another difference from Eng. Law -

There has been some confusion concerning the heir being bound by the covenant of his ancestor - some have supposed that he is bound as heir. This idea however is erroneous.

For ins. A man binds himself, his heirs, assigns &c to suffer another man his heirs &c to travel across or keep a ditch thro' his lot - in this case any person who takes the estate under this incumbrance is bound just as the heir is & on the same principles so that the heir is not bound as heir but as assignee. The heir is bound by the covenant when he has received the estate from the ancestor

In this State Chancery & Ecclesiastical Courts have nothing to do with Legacies as they have in Eng. - nor have Courts of Probate any authority over them ^{by Stat.} & the Stat has made no direct provision but the universal practice is to recover Legacies before the Courts

Estates of Dead Persons

Courts of Corn. Law. Legatees state their claim before the Court & there it is tried.

It is frequently the ^{general} practice for the judge of Probate to order the Ex^r to pay over legacies; tho if the judge does not please to do this the legal remedy is before the County Court—

Lecture 21st Feb^y 22nd 94—

Continuation of Cornish Law

The ad^m always pays costs in unfounded actions where he does not recover.

Our Distribution of Personal Prop^y. is according to the Stat. of Charles, with one or two exceptions viz. Brothers & Sisters of the whole blood are preferred to all relations except children—The whole blood are preferred to the $\frac{1}{2}$ blood in the same degree. And the Brothers & Sisters of the whole blood ^{parents then take, and after parents} being dead, the brothers & sisters of the $\frac{1}{2}$ blood take in preference to any others in the same degree, as Grandfathers for inst^{ce}.

The method of proving the Will among us is different from the English methods both solemn & common. Their common form is to prove it by the oath of the Ex^r but this is totally rejected among us,

their solemn form we have not altogether adopted. As they sometimes cite in the widow or next of kin which is never done here. Our practice is to swear the witnesses the will is then proved. And if any person wishes to dispute the validity of the will he may enter a caveat & the Court of Probate will not proceed any farther in the business till all parties appear. This is a practice adopted without ~~without~~ any direction by Statute.

There has been no instance here of a Nuncupative will - & if any would be admitted, it would not according to the Eng. Com. Law, for that allowed them to be of any amount neither after their Stat. regulating nuncupative wills, for this was made in the reign of Car. at a time when Eng. Stat. have no operation among us. As the property of a Deed is so equally distributed in this State we have no necessity for nuncupative Wills. ~~Who perhaps under our Statute requires all wills to be in writing. - Some peculiar circumstances may merit the adoption of such a law. No will is good unless in writing -~~
We have seen under the Law of England that when the Ex^r is summoned by the ordinary on his refusal he is excommunicated. Our law is different - he is here fined 5^l a month till he appears & then may accept or refuse.

Can a Minor act as Ex^r in Connec.? This is like to be made a question yet it appears plain enough by the Stat. that he may for our Stat. recognizes the English principle. This Stat. however is said to be repealed by another which directs an ex^r to give bonds and as no inf^t's bond is binding it is said he cannot be an ex^r, but this does not appear to be the fair construction of the Statute. It would seem ^{a more reasonable} that an ~~infant~~ ^{infant} ~~as the Stat. has declared an in-~~ ^{as the Stat. has declared an in-} ~~fant may be an ex^r & then that an ex^r shall~~ ^{infant may be an ex^r & then that an ex^r shall} give bonds, the clear inference is that an infant ~~ex^r shall~~ ^{ex^r shall} ^{give, &} be bound by his bond.

With us an ex^r is never a residuary Legatee unless he is made so expressly by the Testator. & there is a plain reason for this difference from the Eng. Law. In Eng an ex^r has nothing allowed him for his trouble & time, but here he is paid for his pains & has no beneficial interest in the estate but is to all intents a Trustee. Where he is a naked trustee there is no difficulty in his being admitted as a witness in an action notwithstanding he be a Pl^r or D^f. But where he is interested as where he has a Legacy he may not be admitted. It is said by some that as he has to pay costs if he does not maintain his action, he is interested & ought

ought not to be admitted to testify. This objection however is easily removed, when it is considered that the costs are not to come out of the executors private purse, but are to be paid out of the Assets.

If the executor owed the Testator ~~Mr. Moore~~ ~~supposed~~ his debt would be extinguished, unless a Legacy was left him. This the Eng. Law

- We have a Practice not directed by Stat. neither found in the English Law ~~of~~ for the Probate to make an allowance to the widow of all necessary clothing, Cow, Sheep & all the property that is not subject to execution. This is never the case only where the estate is insolvent. For if solvent the Statute says whether estate be solvent or not the Court of Probate may ~~has~~ other provision made for her. It has been set off to the widow any estate exempted by Law from ~~execution~~ ^{taxation} complained of, that the Court of Probate should ~~exercise~~ ^{use} this discretionary power. & it is questionable whether the practice is warrantable. In one instance where an indiscreet allowance was made the Superior Ct. abated it but as the relations in that case were willing the widow should have a reasonable allowance the Court remarked that they would not touch the question whether the Probate had a right to exercise this authority.

Our Statute respecting judgment debts have.

State of Dec^d Persons

having no preference among Creditors" has caused some doubt as to the extent of it. The prevailing opinion concerning it Mr Recue conceives to be ill-founded. ^{for example} If a creditor has attached the property of the debtor - before the sale the debtor dies insolvent - now it is said this creditor has lost his hold & can, by the Stat. have no preference to other creditors. This would be unreasonable indeed & is a case that the statute never contemplated in the remotest manner, nor can any such idea be gathered from the expression of the Stat. - the question is not between a judgment creditor and a debtor, but an attaching creditor & a debtor. Besides this case may be compared with the situation of an execution - as ~~where~~ a man has not only obtained judgment but levied his execution, he is not liable to be defeated in his hold by an insolvency. - The Statute only means that a cred^r merely because he has obtained judgment, having as yet no hold of the property of the debtor, shall have no preference to other creditors. for this would defeat the average law. In Eng. if judgment is obtained the officer may proceed to collect the specⁿ

Mr. an attaching creditor cannot hold property only by the law of the Statute

For it is the English principle that whoever by legal diligence can obtain judgment first shall have the preference - paying no attention to the principle of allowing every creditor an equal chance. - Because the form of the execution runs "to take his goods &c. & for want thereof take the body" yet if he be dead & his body not to be found, this can be no reason why his goods should not be taken. - And if money ^{was} to be paid over to the person dying, his executor is his representative completely & may receive it without any difficulty.

In England there is no such thing as Distribution of real property. The entry of the heir is all that is necessary. Our law is very materially different. Our Court of Probate is authorized to distribute the property among claimants & before distribution takes place they are tenants in common & after tenants in severalty. But the claimant cannot possess in severalty without the power of Probate & where distribution is made by the judge between all the legal claimants, this distribution is conclusive. but where there are 2 sets of

Estate of Decd Person

claimants & the judge prefers one - as if a Grand Father & Nephew should claim & the judge prefer the Nephew, this would not be conclusive, being directly against the law of Distributions - in this inst. the G. Father might appeal to the Sup. Court & obtain redress. This appeal from the decision of Probate must be ~~within 12 months~~ ^{to the next Sup. Court} in the County - unless in certain cases of minority &c.

The Adm. cannot be arrested in any suit in the course of the proceedings tho' if any person could for a scire facias, there is no reason why he should not in such case. The reason why he may not be arrested is that the action is not against him but the assets in his hands. Our law & the Eng. agree in this respect.

Our Law respects Advancements same as N.Y.

By our Statute if claims are not bro't in within a limited time they are barred. In case of insolvency it is evident no recovery can be had - for an average has been struck & all the property exhausted - but when the estate is not insolvent there seems to be no substantial reason why a Cred. should not recover his debt when there is property sufficient for it. Nor is it probable the Stat ever in

tended that the Creditor should be barred only as to a recovery from the Ex^r. In Statute language the intention of the Legislature might be thus expressed. "Creditors, you shall not be eternally harassing the Exec^r but shall bring in your claims within a certain time & if you neglect you shall forever be barred" as to a recovery from the Exec^r. It is to be remarked that the Statute is only speaking of executors. There is not the least hint that the Creditor shall be completely barred from recovering his debt & Courts might determine with the utmost safety & confidently with the Stat. that Creditors should recover, in case the property of the Deed should be sufficient, notwithstanding he can never recover of the Exec^r. A creditor in such situation ought to be allowed to take the property wherever he finds it - otherwise the greatest injustice takes place - for he might very probably be absent at sea, or in some foreign nation during the 6 Months in which the Ex^r is to settle the Estate & nothing can be more unreasonable as well as unjust that he should lose his debt in such case.

The General construction therefore put up on the Stat. is unwarrantable & indefensible on every ground.

personal

Of Title by Occupancy to things.

Lect. 22

Feb 22nd 1724th *Ferae Naturae.*

The Property men have ^{with} beasts &c. is a qualified property. it is only common furat with the possession. As soon as the possession is lost, the property in them is lost. The possession continues as long as the animus revertendi can be discovered in the Animal. As to many Animals as soon as this desire of returning ceases, the possession is lost & is open to the first occupant. As in case of Bees &c. To kill these animals it is a Trespass & to take off those which are useful to eat as Bees, Bees &c. it is a tort criminaliter it is felony as much as to steal any other property. But to take off a Dog, a Cat &c. or any animal kept for a musement, is only a civil injury.

It is no trespass to pursue this property on another man's land tho' the owner is liable for damages.

It is the English law That the owner of the soil shall have the honey found in his land, let who will find it. In Con. who ever finds Bees, owns them & may cut down a tree without being a trespasser, tho' liable to any damage he may do. Such kind of damages however fall under the maxim de minimis Lex non curat.

Altho' the Property in these ~~feræ~~ nature is generally open to the first occupant as soon as the possession is lost let them be found where they will, yet when they are so far confined in a man's ^{lost} possession as not to be able to get out, no one has a right to take them. As young birds before they are able to fly &c.

2nd A person may have a qualified Property in Water, air & light. Large Rivers or any streams navigated by Canoes or any thing kind of vessel are consid^d as the public high ways & in such water any person has a right to fish &c. but the small streams on one's land no body has a right to use without the owner's leave & no one has a right to divert such water from its natural course. The Property in this water may be conveyed as other Property without conveying the land with it. The whole benefit of the stream may be so conveyed so that no assignee of the land can set a mill upon it, notwithstanding he is owner of the banks. This estate is merely ideal & is called an incorporeal hereditament.

A man may also convey a right of way over his land & this cannot be obstructed by him.

A person may not be deprived of the enjoyment of a free course of air & light which

he has been accustomed to enjoy about his dwelling house. Such an injury is remedied by an action on the case.

There are other instances of acquiring property by occupancy. as where a man has abandoned his property & it appears evident that he has resigned all his claim to it, then it is open to the first occupant. In Eng. & Connee. there are different methods of taking things from the fortunate finders. In Eng. no owner appearing they go to the King. In Con. the finder is to leave the article in the Town Clerk's hands for a certain time & publish it & if no owner appears the finder is paid for his trouble & the rest goes to the treasurer. There has been an instance of a man's finding money & publishing it & because he did not leave it with the Town Clerk & put it in the treasury, he was prosecuted. Mr Reeve defended him & urged that the article money was not within the Stat. he compared it to the case of a will where all the goods chattels &c at a certain farm were devised & money there was not included. The Stat. also ordered these goods to be sold at public vendue & put into the treasury but to sell

trespasser - but if he stops to pile it up he is a thief, all at once.

He who takes advantage of a stream on his own land by building Mills &c may not be interrupted by a person above ^{him} so as to injure his works - but if A. has accustomed to let out a stream to water his land & a man builds a mill below altho' he may be injured by A's letting out the water yet he can obtain no redress - for A. had the first right.

Lecture 23^d Feby 25th 94.

The Doctrine of Accession has been already referred to the head of occupancy. Where a person improves another's property the English law is that the original owner may take it with the improvement without allowing for the improvement. If the article is changed completely as Wheat ground into flour or Apples made into Cyder, in such cases the taker is not obliged to restore, but is liable for the injury in damages.

Making timber into Tables &c is only improvement & the Table must be restored.

When there is a Confusion or mixture of property he who mixes wilfully loses what he put in, but if the mixture was

accidental it is otherwise.

Goods introduced among us by an enemy, unless by a passport, we may take & the taker becomes proprietor of such prop^y.

There has been great controversy in England concerning the right of Authors to their publications - & as the English law was far from being unanimously settled by the judges & House of Lords & as there is so great a variety of opinions among the most eminent Lawyers, this subject will probably make a figure in Conner the United States. The Question is thoroughly discussed in the 1st vol. of Burrow the case of Millar.

Respecting Title by Prerogative, Forfeiture & Succession see the 2nd vol. of Black. Com.

It may be remarked that there is a very unreasonable distinction in the Eng. Law respecting Sole & Aggregate Corporations, the privileges of the former do not vest in the successor, but with those of the latter do.

Where a man has entered into a voluntary association he holds his right let him move where he will & may assign it for an injury the action may not be Cr'd by an individual member, but must be in the name of all.

Sec. 24th Feb 26th

There is great difficulty in determining what testimony ought to be admitted & what rejected. The rules laid down in the Books are general & will not apply closely to the circumstances of a particular case.

The Rule is That Courts are not to admit any testimony, but the best the nature & circumstances of the case ~~before~~ ^{before} them will admit of. This rule is far from being understood to mean, "The best evidence that can be in the nature of things" for this would exclude the admission of all parol testimony. And it may be that the party might have adduced better testimony than he did & yet that adduced, admitted. As a copy is admitted frequently with a certificate of the proper officer, yet the original would be higher evidence. If however the party had in his possession higher evidence than that offered, the inferior testimony will not be admitted till the superior is first adduced. As if a man has written testimony in his pocket parol will not be let in till the written is adduced; ^{after that} & the parol is admitted in confirmation of the written. If a fact is to be proved as for inst. a date where a memorandum was made of the date & the party or witness has this memorandum, parol evidence of it is inadmissible.

The first Division of Testimony is into
Written & Unwritten

Of Written Testimony

This consists of the Acts of the Legislature & the Records of Courts. Where the private acts of the parties are required to be recorded, for distinction they are called "things recorded". Copies of acts properly records, are never admitted unless well authenticated & no other evidence but such copies is admitted to authenticate them. Tho' there seems to be no reason why a Deed might not be authenticated by witnesses who were present at its execution. A Copy of a record is admissible if authenticated by such ^{particular} evidence of its truth as the Law requires. (of this evidence in its proper place) Some have contended that the Record itself is not to be admitted so soon as a copy this they have endeavored to make appear from the words of the Stat. The Record itself has however been always admitted & it certainly ought for it cannot but be consid^d as higher evidence than a Copy.

As a General Rule a Copy of a Copy is not admissible - for it is presumed that there must be better evidence.

Statutes are divided into Public & Private - A Public Stat. is such an one as re-

relates to the Community at large or a whole class of men in a Community. A Stat. respecting Usury, or a Stat. relating to the whole body of Manufacturers is a Public Stat. But one that respects a particular manufacture, as making of Hats &c is a Private Stat.

The Printed Statute Book is evidence of public acts. Tho in general there is no occasion to introduce it, the act being well understood, at least by the judges.

The evidence of private acts is not sufficient till a certificate is produced from the proper officer, or it may be by the oath of an examiner. The Stat. Book of the several States is admitted as evidence of an act & Rule. Where a Stat is general viz a Public Stat. it may be plead under the General issue, unless it is to avoid a security for a contract & then it must be plead specially & the Stat produced in evidence as in case of Usury.

An after Public act made in addition to or to repeal another act must be plead specially. There can be no reason for this as a proviso may be given in evidence under the general issue. A private act in Eng must be plead specially. The rule in Corr. is different. here a Private Stat. may be given in evidence under the General issue. One distinction

that obtains amongst us is important to be remembered. A public Stat. need not be produced in evidence, while a private one must.

In Eng. Judgements of Courts must come with this evidence - either a sealed Copy from the Court - or with the oath of an examiner. in the latter case a verdict may be made against it, tho' not in the former. Where no seal is used by a Court, a certificate from the Clerk is sufficient, or the oath of an Examiner. In Con. the oath of an examiner will not do, but the copy must be certified by the Clerk of the Court to be true, sealed or not. A seal has been dispensed with even where the Court is ordered by the Stat. to use a seal. All Records in Con. have seals, except single Justices.

In Eng. true Copies & Private Statutes are carried out by the jury, but not such papers the authenticity of which depended upon oral testimony. But in Con. all such papers are permitted to be carried out by the jury.

The reason given in Eng. for not taking such papers is that the jury cannot take the oral testimony upon which the writings depended, but this can be no reason. for they must carry the oral proof with them, in their memories, otherwise it can do no good. - A judgement of Court is in certain instances of no consequence as evidence - ^{Rule} where the judgement depended upon

Evidence

a Verdict for the Court might have been
 aware to the verdict. In such case the verdict
 must be introduced. But this practice ap-
 pears to be indefensible upon principle
 There may have been different evidence
 before the former jury & besides why ought
 the opinion of 12 men who sat in the jury-
 seat to have more weight than the opinion
 of 12 other Spectators - yet the opinion of
 the former¹² is permitted to govern a succe-
 ding jury, while the opinion of the latter
 12 is suffered to have no influence.

It would seem most rational for the jury
 to take the case up independent of any
 former verdict. - When a former verdict
 is to the same point & between the same
 parties, it may be given in evidence.

When the question ~~concerns~~^{is} concerning land
 it is not necessary that the former verdict
 related to the same land. but if it be to the
 same point as that on trial it is admissible.

Lecture 25th Feby 27th GA.

Suppose a man assaulted & the Public Peace
 is broken. the Public Prosecute the Offender &
 by the Testimony of the person assaulted a verdict
 is obtained against him, it has been questioned
 Whether this verdict could afterwards be given
 in evidence against the Offender in an action

lost by the injured person for private damages. It would be very extraordinary if the verdict should be admitted in such case & repugnant to every principle relating to the admission of testimony - for the ~~said~~ Plf. would be evidently taking advantage of his own testimony to recover damages.

An Execution is evidence without the judgement or not, according ^{to} the person who offers it. If it is the Plf. ^{in the proper action} who offers it to defend himself or establish a title, he must show his judgement for if he had none he is a trespasser or if it was a void judgment he is likewise a trespasser. But if it is the Officer who defends when charged as a trespasser it is sufficient to show an execution issuing from a Court of competent jurisdiction - yet the Execution will not be admitted to defend the Officer unless it appeared on the face of it to issue from a Court of competent jurisdiction, to ~~be~~ ^{be} the cause to issue it; or Comparing it with the general Laws of the Land, which every man must know at his peril, it appears that there could be no authority given. By some it is contended & many authorities support the opinion, that if the subject matter of the suit was not within the jurisdiction of the Court all

all the proceedings being before a Court not having jurisdiction are coram non iudice. The judgement is void the execution is void & every thing done by the Officer a trespass. whilst others suppose the true rule is where the Court might have granted an Exⁿ for any thing that appears to the Officer it would be a good defense. This latter opinion however is not supportable for it is the Duty of the Officer to know the extent of the jurisdiction of that Court or the respective Courts under which he serves & as soon as he looks on the face of it and the exⁿ & believes it be coram non iudice he must not proceed to levy it & if he does & is ignorant respecting the jurisdiction of the Court & proceeds it is at his peril. For a discussion of this subject see Book 10th the case of Marshall vs. Hard. 480-2 Willson case of Green & Procter. Lockay vs. Prescott vs. Man. — The doctrine held up in the case of the Marshall has been consid^d insupportable by succeeding judges & also by W. Reeve. See 2nd Strange 993. Where this doctrine is established viz. That where innocent persons join in a justification with those who are not innocent, they shall all indiscriminately be liable for the innocent should not have been caught ^{and this was the only ground on which the officer} in bad company. Strange 50th affirmed.

If any part of the Troupe is wished to be made use of as that a writ issued & was not returned, testimony is admissible to prove that a writ actually did issue -

A Declaration in a former action can not be admitted introduced in a Court of Law as testimony against a second claim - yet in Chancery a Bill filed in a former case is admitted to contradict a second claim the reason for this difference is that ⁱⁿ a Bill the Dem^t. swears to the truth of its contents - & on the ground that proof to show what has formerly been sworn to, is admissible. An infants answer in Chancery is however never to be proved against him in evidence. It will not do to introduce the answer separately - the Bill must be always with it - but formerly before Bills were recorded the answer might be introduced alone in case the Bill was lost - tho' now since Chancery has become a Court of Record the answer is inadmissible without the Bill (Altho English Lawyers pretend to say that Chancery is not a Court of Record, yet it is in fact as much as any other). If the Answer is produced it need not be ^{stated} proved to have been under oath for this is always presumed till the contrary is proved. The Law is different with respect to an affidavit - this being no part of the

Records it must be proved to have been sworn to & produced itself ^{as to testimony} ~~new~~ Copy is admissible.

The mode of Proceeding in Chancery is by Depositions & sometimes there is occasion to introduce there before Courts of Law. Other wise no Depositions are admitted in a Court of Law & this must be with the consent of the parties. The judges will continue ^{the cause} when of the Deposition is of considerable importance till the refusing party will agree to admit the Deposition & this under ^{the child's} sentence of waiting till the witness who is supposed to be abroad ~~till~~ returns. Sometimes the Parties proceed in a Court of Chancery where they should have gone to Law on purpose to have Depositions admitted. Depositions from Chancery are not in ^{hand} any case to be admitted in Law. It is only in such instances where the witness himself is either Dead, in a foreign country, or prevented by some inevitable accident as sickness &c. from attending.

Testimony in perpetuam rei memoriam is where Application is made in Chancery, to take Depositions of old people or of persons going into a Foreign Country, when an action

is expected to be brot against a man hereaf-
ter - In such cases Chancery will suffer the Depo-
sitions to be taken. Our Sup. Court are by Stat
vested with power to give men (dedimus potes-
tatem) authority to take such depositions -

Our Law respecting Depositions is different
from the English - Testimony viva voce, & Depo-
sitions are both admitted in both Courts, & Depo-
sitions from a Court sitting as a Court of Chan-
cery are not admitted in a Court of Law - Depo-
sitions here are not suffered to be taken at
a less distance than 20 miles from the Court -
Some have supposed this law a privilege to the
witness & that he cannot be obliged to come
from a greater distance - This however is a
mistaken notion - it is a privilege to the par-
ties only - They may be compelled to come from
any distance. In Eng. when a trial of a matter
of fact is applied for in Chancery, if an an-
swer has been put in & the Chancellor will
not try it he may send it to a Court of Law
provided the Respondent will consent to
have the answer there read.

Lecture 26th Feb^r 28th 94.

A judgement of a Court of competent ju-
risdiction is conclusive testimony - no averment
can be made against it, only where it was ob-
tained thro' some fraud in one of the parties -
It is not in such case, considered as being rendered
thro' any fault in the judge. -

Of the effect of a Foreign judgement.

By foreign judgement ^{is} meant those obtained in different countries subject to the same power. These are admitted as evidence, tho' subject to revision. As a judgement obtained in Jamaica & India would be admitted in Eng. as testimony but liable to be examined. Or a judgement rendered in one of the United States is admitted in any other State, yet subject to revision. The 1st case in Douglas Rep. will shew the effect of a foreign judgement in Eng. A case may happen in the United States of a judgement being rendered against a man without his knowledge. As if a man in N. York owned property in Massachusetts, let this property be of ever so small a value, it may be attached & judgement rendered against ^{him} ~~them~~ for any sum without the Deft's knowledge. Tho' he is allowed to come within two years & obtain a new hearing, but after this period he is supposed by some to be remediless. If this Law is established the greatest injustice might take place for judgements at this rate might be obtained against a man for thousands & this the Deft. if he ever appeared in the State where the judgement ^{was obtained} would be liable to pay the whole execution, where no debt was due. Our Courts have, however, adopted a rule which may

prevent such fraud. After the time limited the Court will presume that the Dft had no tie & will continue the cause no longer but render judgment. Remove this presumption & make it appear that he had not notice a new hearing may be had. This is a very equitable Rule & will preserve the principles of Law entire. A judgement obtained against a man without giving him actual notice ought to be considered fraudulent & liable to be reversed. And if actual notice is given the Dft whether legal or not, the judgement ought to be held good. The Plf. might easily give the Dft notice by writing to him informing him of the true state of the business & this is nothing more than his duty.

This is the nature also of our foreign attachments upon absconding Debtors. A Jues B. who resides in N.Y. & leaves a copy of the writ with C. who is supposed to be B's factor - C. appears in Court & says he is not his agent - yet notwithstanding this the Court will render judgement against B. for the whole demand. The way to collect a judgement against an absconding debtor is to bring a seize facias on the judgement against the factor. ~~A copy is to be left with the agent~~ provided he will not expose the goods. But in the case supposed A is careful not to bring his seize facias for he knows C. has no property of the Debtor's.

but may perhaps wait for B to come to this State & then levy his execution & commit him to jail - or he may go to N.Y. & there bring an action of debt on judgment & produce the copy of the judgment as evidence. In this way great iniquity might be practised. B ought to be permitted to make averment of these facts that justice might be done. Our Courts have invented a method to avoid the Stat. by saying that a foreign judgment is good for ~~nothing~~ no other purpose than to bring a *scire facias* upon ^{judgment} against the garnishee & by this means they have so that the property of absent men is prevented from being unjustly taken.

The Law respecting records of Marriages, Births &c. is different from ^{that of} other records. The Law is extremely loose as to what shall be evidence of these. If there has been a record & can be come at parol testimony is not admissible - but if there was no record, or the record is burnt or lost, other proof is admitted. Before parol is admitted it must appear that diligence has been used to find the record. A Clergyman's certificate, a record in the family Bible, or memorandum in an old Almanack are admitted to the exclusion of

Parol testimony.

Of Deeds

"Deeds" in Eng. include all conveyances & contracts under seal. It is a rule of Eng. Law that he who claims by deed must make a protest of it in Court for it is another rule of their Law that if he ~~does~~ make a protest it is not made the deed need not be produced if challenged. But in our Law it makes no odds whether protest is made or not, for in either case it must be produced if challenged.

In Eng. in case of a claim upon a deed the deed is not required if the party is not entitled to the custody of it: as in an action to eject a widow from land in dower, as she is not entitled to the custody of deed she is not required to produce it. Her assignment is a sufficient title till for her until a better title is produced. She then however in such case might be compelled to show the deed. In this country we have no necessity for such a distinction, our deeds being all recorded & a copy might in the instance of the widow be produced by her.

After the deed is produced it must be proved to have executed & delivered. This is to be done by witnesses if alive & if dead or absent it may be made to appear from comparing their hand writings ~~of the grantor with the name on the deed~~. When a deed in Eng. is burnt or lost, its contents

Evidence.

may be proved by persons who have read it, or a copy may be admitted with testimony to prove it a true copy. - This is the Com. Law In Con. by Stat. an acknowledgment before a Justice is required & if the Justice is alive when the validity of the deed is called in question he is admitted to swear that the deed was executed & delivered. Tho' the more general practice here is only to execute a knowledge its execution & not to deliver the deed till after acknowledgment & the acknowledgment & execution is consid^d as sufficient presumption that it was delivered. 2 witnesses are by Stat. required to a deed & if the subscribing witnesses can be had, no parol testimony will be admitted.

Of Comparing handwriting

Gibert in his Law of Evid. makes this distinction: In civil cases the handwriting compared would be sufficient testimony. But in criminal cases inadmissible. Morgan considers it weak evidence in both cases. & Buller thinks it conclusive in no case. In this Country witnesses are not required to Notes & it may be made to appear that it was not the hand writing of ^{the} person whose name is on it, but evidence is not admitted to prove that it was another man's writing. It is the practice

of our Courts to consider the evidence of ~~at~~ a man's hand writing as conclusive in civil cases, but not in criminal following the opinion of Gilbert.

Lecture 27th March 1st 94.

In this State we have embraced a wrong idea respecting the design of recording deeds.

It is general supposed that deeds are recorded that when the deed is lost the Copy may be admitted as evidence of the claim - but this was not the design of recording them - the true reason of this practice was, to suffer a man who was about to purchase to examine the records & see whether the vendor had any title to the land offered for sale & thus prevent the vendee from being imposed upon. But our practice gives great room for fraud. A man might forge a deed & ~~get~~ after getting it recorded, burn up the deed & ^{by producing a copy of record} ~~in that way~~ establish a fraudulent claim. Our practice was ~~taken~~ introduced by an authority in Salk²⁸⁰ case of Smartel & Wms. But this authority is a doubtful one in the opinion of Butler & other Lawyers. Evidence ought to be required to prove the execution of the deed if the deed itself is lost.

Possession of a ~~deed~~ land ^{40 years} with the deed is sufficient evidence of a man's claim without any testimony to confirm the deed. I. such a case

case if a Jury have bro't in a special verdict
 it "That if the deed was executed & delivered
 it was done above 40 years ago & that the person
 claiming under it had been in possession du-
 ring this period" the Court cannot draw the in-
 ference that the deed was actually executed &
 delivered, tho' they have heard the same evidence
 upon which the jury would be authorized to draw
 such an inference. We have just seen that posses-
 sion 40 years with the deed is sufficient evidence
 of execution & delivery, yet the jury must express-
 ly say that the execution & delivery were legal o-
 therwise the Court would be puzzled to draw
 such an ~~invidious~~ ~~complicated~~ a logical inference
 from such complicated premises, and the verdict
 would avail nothing. Also in case of trover
 if the jury have found a demand & refusal
 to deliver up the prop^y trovered, altho' these words
 legally imply a conversion, yet the Court are not
 allowed to conclude that there was a conversion
 unless the jury have mentioned this in their
 verdict. — This is one among the numerous in-
 stances of a childish fear in the judges of trans-
 gressing maxims where there is not even a shadow
 of danger & is inconsistent with that digni-
 ty which they pretend, & which they ought, to pre-
 serve.

A deed without any solemnity attending it ex-
 cept a delivery, may be good as a covenant, altho'

it will convey no title. But if the grantee has gone into possession & the grantor brings an action of ejectment against him, the grantee may file a Bill in Chancery & compel the grantor to complete the contract by giving a valid deed & if the grantor has before this given a good title to another, the first grantee tho' he cannot hold the land, may yet bring his action on the defective deed, as a covenant & recover back his money.

To convey land by Will there must be 3 Witnesses & if only one of these can be obtained he will be sufficient to establish the will.

Of Erasures & interlineations—

Those made by persons any way interested if ever so immaterial render the deed totally void. But an immaterial alteration made by an indifferent person will not invalidate the deed. Any addition or alteration by the consent of both parties render the deed void for it is said in such case not to be the same instrument that was before witnessed & sealed. If the property might have been conveyed without a writing the erasure would not destroy the bargain, tho' it would the writing. As a Bill of sale of a horse, an erasure or other alteration would make void the Bill of sale, yet as the horse might have passed without the writing, the bargain remains firm.— If the seal is broken off by the parties

unless done in Court, or if it be broken off by any accident, the deed is destroyed. In case of a joint deed given by 2 persons, if one seal is broken off, the deed is void as to both. for it is said that the fact of one seal being off is evidence of a discharge & the discharge of one is the discharge of both. This doctrine however appears to be very unreasonable. Let the seal being broken off be presumptive evidence of a discharge, yet if this presumption can be removed by parol proof it ought not to be a discharge of ~~both~~ either.

These principles are not fully settled.

As to Unsealed instruments the action may be brought as on a promise & the writing given in evidence. Wherever the covenant is detailed at length & the consideration appears the action may be brought on the promise - but where the consideration is removed behind the curtain, the contract is a specialty & the action must be brought on the writing.

2nd Division of Evidence

Of Parol Testimony

Of persons excluded from being witnesses.

1st Those who want integrity

2nd Those who want discernment.

Under the first head are included persons who are so interested that they are presumed not to give their testimony with integrity.

it being natural for the best men to incline in favor of their own cause. Persons only apparently interested; as a Guardian in an action of an infant; or a Trustee in an action concerning property held in trust, are admitted to testify.

~~L~~ Lawyers make a distinction between interestedness in the event, & interestedness in question; ~~concerning what shall be considered interestedness in the event, & interestedness in the question, there is much dispute.~~

Interestedness in the event is where a man is immediately concerned in the event of the suit in which he is called to be a witness that is - he is to gain or lose ~~by~~ the cause in question as it goes one way or the other. As if a man covenants with the Plf. that if he gains he shall have a proportion of the profit, or with the Dft. that if he loses, he will bear a proportion of the loss, - in either of these cases the man thus covenanting is eventually interested in the suit & is therefore an inadmissible witness.

Where a man is collaterally interested, as if two men were in similar circumstances & one should bring his action first, the other may be said to be interested in the question

Evidence

Such kind of interestedness will in no
 case exclude a witness according to the Eng-
 lish Law as it now stands See Durnford
 3rd volume the Case of Bent & Baker in which
 this doctrine is fully settled & the 4th Burron
 2251 in which Lord Mansfield gives the true
 reasons in favor of these principles - Before
 this decision in Durnford the English Law
 on this subject was extremely vague & the
 adjudications were altogether inconsistent,
 sometimes Witnesses interested in the ques-
 tion were rejected & in some instances admit-
 ted - & the same inconsistency at ~~London~~
~~prevails among our judges~~ is observable in
 our adjudications - our judges having fol-
 lowed the old English practice - But it
 is to be hoped that the present English
 principle will soon be adopted by our
 Courts. - Authorities relating to this subject.
 Hard. 532. Roll. 885. Strange 728-595.
 Lord Raym^d 396. Som Raym^d 191.

Lecture 28th March 3rd 94

If it appears that any use can be afterwards
 made of judgment by a witness, which judgm^t
 depends upon his testimony he is interested in
 the event & is inadmissible. But this is not
 the case where 2 men are ~~both~~ assaulted by

at the same time. One may bring his action & introduce the other as a witness & no use can afterwards be made of this judgment. but when the other comes to bring his action he may introduce the man assaulted with him as a witness. In case of a forgery of a note the ^{apparent} obligor cannot be admitted to ~~swear the~~ testify that the note was actually forged. If it is the practice to vacate the note after forgery is proved for the witness in such case would be immediately interested in the event. There is a distinction made in Co. Litt. also in Hard. 532 important.

Of the admission of Members of Corporations to testify.

Where there is a balance of interest, in those cases where it is evident that the member of the corporation would be led by his interest to swear one way as much as the other, or where ~~he would be more so~~ it appears uncertain on which side his interest leans, in all such cases he is an admissible witness.

In a public prosecution against a County for damages sustained thro the badness of a bridge, the inhabitants of the County are admitted to testify in the cause on the ground that they are as much interested to have good bridges, as they are to avoid the small share of the damages which the Plf is about to recover & such a prosecution would tend to make them keep the bridge good.

Evidence

In another instance a member of a corporation is admitted. Where proof is required to show a man promised a Donation as a Bell for a meeting house, or to establish a school &c. In all cases where the members will be admitted the donation must be such as they are not obliged to supply if the ~~cat~~ donation should not be established. For if they were obliged to purchase the Bell unless they established the donation they would be directly interested. Any member of the society is admitted to testify except the agent who carries on the suit & there can be no reason why he should not be admitted as he is no more interested than the rest. Testimony to prove a covenant which might have been reduced to writing is not admissible. As if a preacher agreed to take continental money for his salary when the question come up the members of the society were not admitted to swear that he made such an agreement for the contract if there was any ought to have been committed to writing.

It is a principle in our Law & the English that where a Stat. cannot be carried into execution without admitting interested testimony it shall be admitted. This principle however has been rejected by the Circuit Court. If a man should be robbed he cannot be supposed to carry evidence that about with him to prove

That he was robbed, but in order that the Stat. may be carried into execution he is admitted to testify against the Robber. This is a ~~convicted~~ rule in the Law of England & in ours till the determination of the Circuit Court.

Such witnesses are not suffered to relate any other circumstances than are necessary to carry the Stat. into effect. An authority in the 3rd of Mod. 115 speaks of this principle, as being fully settled. But it is contradicted in 2 Cases in Str-ange 1st 316. & 2nd 1184. There are cases of inform^{2d} ^{Roll} 689. ations where the informer was to have $\frac{1}{2}$ the

penalty. In actions of account also the parties are admitted to testify. & this with the set of Cases where witnesses interested are admitted when the Stat. otherwise would fail of execution. ~~These are the only~~ ^{is the} instance in which interested persons ^{in court} are admissible before a Court of Law. A refusal to testify when called upon at Law is a contempt of Court for which the offender may be imprisoned. —

In Chancery the parties may both be admitted as witnesses, the Dft always & the Plf. if the Dft pleads to appeal to his conscience for the truth. They are not however witnesses in the same sense as those at Law.

It is no contempt of Court for the Dft. to refuse to testify - but in such case the accusation of the Plf. is taken for granted. A Dft shall never be obliged to give evidence if by it he shall

subject himself to a penalty. Yet if, the penalty is going to the Plf & he waives ~~the~~ it the Dft must then speak ^{or it is taken for granted} what the Plf asserts. If a man is called upon to prove the highest degree of baseness in himself, if by it he is not to be subjected to a penalty, he must ~~must~~ testify or it will be taken ^{pro confesso}. If the Stat. of Limitations has run upon a penalty so that the ^{Plf} need not be subjected, ^{yet} Courts will not oblige him to testify.

By our Stat. we have made some encroachments on the Com. Law respecting the admission of Witnesses. As in an action of Book debt both parties are admitted. Our Courts seem to have involved themselves in some inconsistency in one respect. When action has been brought on a Note & the Dft has receipts but not to be found he is not allowed to swear to them - yet he may in his turn bring an action of Book Debt & charge what he supposed he took receipts for & this he may swear to.

In an ~~action~~ action for a private assault the Plf is admitted to testify as to the assault, ^{the battery} itself & as to the words which bro't it on; but not as to the degree of injury. This must be proved by those who have examined the wounds.

Another encroachment our Stat. has made upon the Com. Law. In a case of trespass, the Plf

may testify that he believes the dft cut off wood, for inst, & the dft is obliged to swear whether he did or not, or else it will be presumed he did - but if he says he did not the dft can bring in no testimony to prove that he did, as he could in case of the Right Law.

~~From action~~ Where counterfeit money has been received the man is ~~allowed~~ to swear of whom he received it & recover back its value. All these instances are against the maxims of Com. Law.

Where a dft. arbitrarily joins a dft. in a suit in order to exclude him from being a witness, the Court will erase such dft. out of the Declaration & admit him to testify. If there is not sufficient evidence to prove him guilty, or if the probability is that he is not guilty & there is no other evidence by which the case may be illustrated he will be admitted.

Lecture 29th March 4th 94.

Husb^d & Wife are excluded from being witnesses for or against each other. This is a general rule & certainly does not correspond with the maxim that they are one - for a person is admitted to testify against himself. Even if they are willing to testify against each other they are ~~not~~ prohibited on principles of policy.

To this rule there are a few exceptions. In the instance of high treason they may be

Evidence

witnesses against each other. This principle is founded upon the idea that they are under a superior obligation of allegiance to their Prince. ~~They are therefore bound to it~~

In complaints for personal abuse they are witnesses ~~for~~ against each other. & they are admitted before any other testimony - after them, other witnesses may be introduced. - If the Public prosecute a man for a private personal abuse to the wife, she is admitted as a witness. - The first case of this kind was that notorious one of D. Audley's. This authority has been questioned by some common place writers & in one case denied by Holt to be an authority. Yet notwithstanding all that has been said to invalidate it, it is established fully at present (see str. 633) & is founded in principle.

By the Civil Law children were excluded from testifying for their parents - but under the English Law no relations ^{are} excluded except Husband & wife.

Attornies, witnesses

Attornies are generally allowed to testify in causes in which their clients are concerned. An attornee may not tell the Court any thing the opposite party said when it is in proof. That he led on

The conversation - but any thing that was said voluntarily he may relate.

Attornies are prohibited by law from testifying against their clients and thing communicated after they are employed. & if an attorney is asked a question relating to such circumstances he is not at liberty to answer & indeed no one has a right to ask a question of this kind - but with respect to any matters that happened previous to his being employed by the client he is an admissible witness.

Participes criminis are frequently allowed to be witnesses. There is sometimes danger in admitting them but the evil attending this practice is more than compensated by the good effects. Many crimes which would not otherwise have been disclosed & punished, have been discovered by admitting one of the rogues to testify against the others, on condition of pardoning him, & criminal.

Testimony by confession is good evidence in both Civil & Criminal actions. Tho if a man appears voluntarily & acknowledges himself guilty of a crime & there are no other corroborating circumstances the jury cannot convict him. - What a person accused of a crime has said before a court of enquiry, in Eng. it must

Evidence

be collected from the minutes of the Court & in Con. it ~~was~~ is the practice to obtain it from the mouth of justice; & not from ~~any~~ bystander.

What a dead man formerly said under oath is evidence - yet what ^{he} has said not under oath, as a general rule, is no testimony. tho in some instances it is admitted & it seems reasonable that it should be admitted when it is the best evidence that can be obtained. What a man said in contemplation of death is admissible for it is probable he is as likely to tell the truth in this as in any situation, but if he did not die in that sickness, what he said cannot be introduced - nor what he said when he was like to die unless he contemplated death.

What a person has been heard to say concerning the boundaries of his land &c may be adduced after his death.

When a man's testimony is impeached, evidence may be introduced to shew what he said before - If a person has uniformly told one story not under oath when he was ~~disinterested~~ & under oath tells a different story, testimony may be adduced to relate what he said always before he was put on oath & what he said first

will prevail in preference to his testimony under oath. evidence however is admitted of ~~corroboration~~ what a man said previous to his being put on oath, ^{to corroborate what he said on oath} as well as to impeach it, of persons excluded thro' want of integrity.

Persons rendered infamous by crimes are not allowed to be witnesses. Under the class of infamous characters are reckoned those guilty of Felony, perjury, cheating &c. In order to exclude them, they must not only have committed, but have been convicted of the crime. & the record of the Court must be produced as proof of the conviction. Barnet is one of the crimes falsely & will exclude a witness if convicted.

Our Courts have made many innovations in the Com. Law on this subject. & notwithstanding a man has been ^{convicted} guilty of a crime if it can be made to appear that he has sustained a good character a long time since the conviction he is a good witness. This is not the Law of Eng.

A Pardon operates to qualify a man to testify, altho' it appears on the record that he has been convicted.

In Eng. formerly no infidels could be admitted as witnesses except jews. but now all are allowed to testify & are sworn by that

Evidence

religion which they may happen to profess. Quakers in Eng. are not witnesses in criminal cases - This extremely unreasonable. Deists upon their principles would not be admitted - but as they are bro't up in a Christian Country, it is presumed ^{are Christians} that they can relate the truth. Atheists are excluded -

Under our Law, from the form of our oath no persons can have any objection to ~~take~~ it swear by it & accordingly all except Atheists are admitted -

Lecture 30th March 5th 94

Children are admitted to testify at different ages in different countries & indeed in the same countries it depending more upon their discretion than upon their age - Some have fixed the period for admitting them at the age of 10 - They are allowed frequently to relate their story without being sworn - They are never put on oath till they appear to understand the nature of an oath. In Connec. they are not put on oath till 14.

In Courts following the Civil Law, one credible witness is not sufficient to establish a fact - If the proof is by witnesses, they require 2 & if other testimony is admitted it must be equivalent to the evidence of 2 persons.

In England & France. One credible witness is sufficient yet more witnesses with and presumptive evidence would not be rejected if they could be had conveniently. No quantum of evidence is prescribed by ~~law~~ our Law it is left pretty much with the discretion of judges as to what testimony may be sufficient in the particular case before them.

As a General rule hearsay testimony is inadmissible. Yet in some instances it is admitted. It may be testified what a witness has said before when not under oath. It may also be testified what persons have said concerning matters of tradition as births, boundaries, Pedigrees &c. When a man's character is impeached, hear-say evidence is admitted. In such cases the witness is not to say what he thinks of the man, but must inform concerning his general character among his acquaintances. A man's particular vices are not to be brought up to view. The Court are only to enquire out his general character. In an action of Book debt evidence is admissible to shew that the Plf is a dishonest man. Testimony is not let in to shew that a man is malicious who is carrying on a malicious prosecution. Such evidence was formerly admitted but is now rejected as tending to try characters & not facts. Yet a knowledge of a man's character will have great influence upon the triers & if it has influence when they know, why ought they not

to be informed by witnesses; that it may have its proper influence? It is evident to see that there is the same danger in either case of trying characters & not facts.

As a general rule Witnesses are not to relate their opinion but only the facts & from those facts the jury or judges are to draw the inference. It may in numerous cases make an essential difference whether the witness gives his opinion or not as the ^{decision} ~~case~~ will frequently depend altogether upon the manner in which any thing is said or done - & this can only be found out by the opinion of the witnesses.

Cases where 2 Witnesses are necessary -

Two witnesses are necessary to convict a man of high treason. Yet one overt act ^{proved} by one witness & another overt act proved by another witness is sufficient.

Two witnesses are also necessary to convict a man of perjury on the ground that the testimony of one witness would only set oath against oath & just balance each other. Instances however are supposable in which one witness ought to be held sufficient to convict.

By our Stat. all testimony in both civil & criminal cases ^{is} ~~are~~ left on the footing of same footing as at Com. Law except in Capital crimes. When the consequence of

a crime is to be death 2 witnesses are required or what is equivalent to there. Some have supposed it necessary that 2 witnesses must have actually looked on & observed the commission of the crime - but this is far from being the Law - for one witness with corroborating circumstances is many times sufficient & indeed only presumptive evidence will sometimes convict a man. One principle however is fully established that the testimony of one credible witness without corroborating circumstances is insufficient to convict a man of a capital crime.

Interestedness in the Event is proved by two methods —
1st By witnesses & 2nd by the oath of the person said to be interested. These methods are concurrent but by choosing one the party is obliged to waive the other. In the latter method by *voir dire* if he discloses any fact which shows him to be interested in the event, or if he supposes himself interested & bound in honor not to testify, Courts will exclude him, but if the Court think him interested & he says not, they cannot exclude him.

The method of summoning a witness before a Court is by a writ of *subpoena*, if the

Evidence

party requesting his attendance has complied with the requisites of the Law, the witness is obliged to attend the Court. His expenses must be tendered to him & also his travel to & from the Court, & pay for one days attendance.

This is our practice. Some English writers lay it down that the party must tender the witness his expenses, travel & whole pay for his attendance. But it is impossible to know how long he may want the witness & it would be difficult to tender ^{wages} just sufficient. It is probable however that the witness need stay as long no longer than he has need pay for.

If the witness neglects to appear the Law is that he is liable for the damage the party sustained in consequence of his failure.

It is extremely difficult in such cases to ascertain the rule of damages. For it is altogether uncertain what the witness would have testified. Before a witness is thus liable he must be called by the Clerk 3 times & then his failure & the return of the subpoena are to be recorded.

Of Proof by Presumption

Evidence raised by presumption may be sufficient, but is liable to be removed by contrary positive testimony.

When one fact is fully established

& another fact is ~~the~~ necessary consequence
 & inseparable from it. This last is said to be
 a violent presumption. As if it was estab-
 lished that it was clear in the Evening & ~~in~~
~~the morning~~ no snow on the ground - but in
 the morning the ground was covered with
 snow, this would be a violent presumption
 that there had been clouds during the night -
 which presumption is impossible to be re-
 moved. Follow the Definition strictly & it is
 the highest kind of evidence. The old case
 of a man being found with a bloody dagger
 running from a ^{dying} ~~dead~~ man weltering in his
 blood, is cited by some writers as being a vio-
 lent presumption - yet it is not according to
 the above definition for ^{such presumption} ~~it~~ may be, & indeed
 in a very striking instance, has been removed -
 A man had sworn revenge upon B - his ack-
 nowledged enemy, was found drawing a poign-
 ard from B's breast, & ~~was seen~~ who was
 dead & covered with blood, & was executed -
 afterwards the true murderer confessed the
 crime. &c. The fact was that the person executed
 happened to pass by the mort. ~~the~~ man was
 stabbed & was drawing out the bleeding dag-
 ger ~~when~~ & discovered in this act - So that
 such presumptive evidence is liable to be removed

Evidence.

The instance, of a Receipt for the last term in case of Lease being evidence that all former rent is paid, is related as violent presumption but this certainly ^{might} ~~may~~ be removed tho' in Law it is held sufficient.

Interested witnesses are said to be admitted only "from the necessity of thing" This is a vague expression & might easily be construed to mean that when no other evidence could be found, this might be let in from the necessity of the thing. But the Cases included under this phrase are settled & are as follows —

- 1st Where a Stat would be defeated if the interested person should not be admitted.
- 2^d In actions of account
3. In an action against a Sheriff for a voluntary escape, the escaper is admitted altho directly interested — for if the Creditor recovers out of the Sheriff, he can have no claim upon the escaper This appears rather an unreasonable rule.
4. The case of a rescuer. the person rescued is witness against the rescuers —
5. An agent is always admitted to testify that he transacted the business of his employer. The agent is deeply interested for unless he swears that he discharged his duty properly, he himself would be liable. This is a very important branch of the cases of interested persons being witnesses, being in every day's practice.

6. Where there are two Trespassee & one is called in to testify in an action against the other.
7. In a complaint against the husband the wife is admitted to testify; that the husband may be compelled by Court to give bonds for his good behavior.
8. The Mother of a Bastard is a witness to charge the Father -
9. Where a Servant's fidelity is questioned by the Master, the servant may testify ~~ag~~ in an action against the person who he says committed the fault. As where a servant has been entrusted with his master's property, he is a witness to prove that another took away the property, or wasted it. &c.
10. Additions to these cases in Connecticut.
10. Book delt -

11. The case of Assault & Battery;
12. Our Stat. which suffers the Off to put the Deft on oath when it is believed that the Deft. committed a trespass.
13. Where a man is robbed he is a witness against the Robber - This Eng. principle, ^{also} not intended ^{that} in Con.
14. The case of a man's receiving counterfeit money.

Lecture 31st March 6th 94 -

- An interested person is capable of becoming a proper witness by a release. 3 Burnford 27.

When a person becomes interested after he is called as a witness, his testimony is not good in that party's favor for whom he is interested but is good witness for the other party. Stra. 652. 406. Durnf 27.

Miscellaneous principles in the Law of
Evidence with their authorities —

A witness may swear to the fact of an entry made by him on paper if he remembers his having made the memorandum. But if he has no recollection of his having made it the memorandum itself must be produced —

Evidence may be let in to prove there were other considerations to a ^{scaled instrument} ~~writing~~ besides that expressed in the instrument but this is not to contradict the ~~cont~~ writing. 3 Bunn^d 475.

When a release of all demands is given, it does not release that consideration out of which the release grew. & if part of the consider^{ns} are specified, others may be shown by parol testimony as well as tho' 15 shillings had been the nominal consideration. This last doctrine I heard recognized by the Sup. Court Litchfield Jan 7. 94. R.F.

See a case in 3 Bunn^d 707. respecting Hearsay evidence in which the Court were divided.

A witness who absents himself wilfully may be attached for contempt of Court Doug. 540. Ala. 510.

An Executor when named Trustee is a witness Doug. 134.

It is a Rule that if a party offers testimony inadmissible because not the best the nature of the thing admits of, the Court may look at it.

cut it, & if it is against the party offering, it may be read Doug. 752.

The Declaration of a dying man adm. ¹²⁵³ 3 Burr 1253

Parol evidence is admitted to prove that the Parents intention was, that a portion should not adveem a Legacy. 2 Brown Chan. 163. & that Legacies given by a Codicil were meant to be accumulative. 2 Brown Chan. 519. 521.

Subscribing witnesses to a will must be called if they can be procured & if not to be found their hand writing proved. It has been a great question in Corp. Whether other testimony is admissible to contradict the evidence of the subscribing witnesses? And is determined in the affirmative. 1 Black Rep. 365. 3 Mm 396. but the subscribing witnesses testimony is first to be introduced.

Length of time is sometimes presumptive evidence of the Discharge of a Bond. 1st Black Rep. 532. Courts have never gone below the time of 18 years -

When a subscribing witness is Bail he is compellable to testify. Stra. 406.

A person apprehending himself interested when he is not, is no witness Stra 129.

Parol evidence of the contents of a deed when admissible - see 1st Vero 505.

When an expression of the Testator is ambiguous, parol evidence is adm^d to show what

Evidence

The intention was, even against the legal construction of the expression 2 Affm 136. In this case Harol evid. was adm^d to shew that what the testator meant by heirs on the mothers side & the meaning was against the legal construction.

If a Deposition of a disinterested person is taken & before trial he becomes interested the Deposition is inadmissible if in favor of that side on which he is interested. See 2 Raym^d 1008. It is curious to remark that a person who is heir to the Estate, of an old man just ready to die is a good witness & not consid^d interest^d respecting any matter concerning the Estate, & yet he who has an estate in a remainder let it be ever so distant in expectation is rejected as an interested witness & ~~therefore inadmissible~~ ^{principally} we startle at such an unreasonable & conceive there must ^{have been} a flaw ~~in the wisdom of those who formed it, or else we must admit the perfection of human Law~~

Endorsements are sometimes admitted to rebut the presumption of a Bond's having been paid when the legal length of time ^{of 18 years} has run upon it. The Rule is That When the en-

Endorcement was made before the time had run upon the Bond; such endorcem^t relieves the presumption of the Bonds having been paid. But if made after the 18 years had run it is otherwise. This however is an unreasonable distinction for it is in the power of the obligee who keeps the Bond to make the endorcement when he pleases.

The evidence of a single witness corroborated by circumstances, against the Def^ts answer in Chancery, is sufficient to found a decree upon. 1 Brown Can. 51. It is the practice in such case for Chanc^y. to send the witness & the Def^ts answer to a Court of Law & jury & after the facts are tried they are sent back to Chancery.

The verbal declarations of the vendor at the time of the sale are not admissible to contradict the written Conditions - see Black. Rep. Henry. 287. We Rec^d once lost a case which probably he would have obtained had he known of this. ~~Shorley~~ Lane published lands for sale freed from all incumbrances when in fact they were not thus free & the Court suffered him to let in testim^y. that he had told many of the Land incumbrance under ~~that~~ which the Land lay^r & obtained his cause -

A person who has contributed to give currency & credit to a writing shall never be admitted as a witness to impeach it as in case of usurious contracts &c.

The following authorities respecting the admission of witnesses interested in the question viewed together shew that they are inconsistent & irreconcilable. Salk 283.

Salk 286. Charge 595. leaving of the Note
Lecture 32nd March 7th 94.

There are instances in which a person's general character may be enquired into not only the characters of the witnesses & parties, but of other persons. & not only general characters but particular facts respecting characters may be admitted to be proved. All ^{these} cases may be included under this General Rule. Where a general character is put in issue by the pleadings whether it goes fully to a recovery or defence or only in mitigation of damages, particular facts or a general reputation may be enquired into. But you are not to enquire to furnish evidence that it is probable that the thing charged was done. So instance in slander A. sues B. for charging him with being a thief. A wishes to prove that B is a slanderous malicious character. Can he do it? Examine

for what purpose he wishes to make this proof—when he has made it, will it entitle him to damages without proving the charge? Certainly not. Will it entitle him to greater damages than being the case, after he has proved the charge? Not greater than he had received if B had been a better character. It is not then to affect the damages but for another purpose, — to furnish evidence that he actually slandered, ~~that~~ to render it probable ^{that he is guilty of the charge} — it is to come in aid of the evidence to induce a belief that the Plf's declaration was not ill-founded — but for such purpose, it is not within the rule laid down, & is inadmissible, tho' for another purpose it might be conclusive. On the other hand B wishes to prove that A did steal as stated in the Declaration — Shall he prove this? Examine again for what purpose the proof is wanted — will the proof of this fact exonerate B from damages? It certainly will — it is a complete defense & the proof is admissible — for farther illustration we will suppose that if B. proved he stole it would not be a complete defense — yet would it lessen the damages? In such case the proof is relevant & admissible — for tho it does not fully justify yet it lessens the damages. — Again suppose he cannot prove any particular theft — yet A's general character

Evidence

is that of a thief—Shall CB. prove it? Will the damage be as great to charge such a man with being a thief, as a good character? Certainly not. It is therefore admissible.

The case of a Mistress who preferred her Bill to recover her annuity from the man who kept her may illustrate this principle & herein of the distinction made between modest & immodest women before the Debauchee received them. The Case of a Bill brot for a divorce will also explain the rule— and the case of an action brot by a parent against the man who debauched his daughter, the Dft may in such case introduce proof that she was of ~~doubtful~~ a lewd woman before &c

Parol Evidence is admitted to rebut an Equity Where the Legal construction is one way & the Equitable is another. in such case parol testim^y is introduced to move the Testator's gratuitous intention. Thus the legal construction shall prevail.

There is a vague maxim that Affirmative testimony shall prevail over Negative. This however is far from being always the case.

It is true so far that if a number were in a company & 1/2 of them or even fewer should afterwards swear to a fact done in the company & the other 1/2 or more should swear they did not see

Evidence

174.

see the same fact, in such case the Affirmative would clearly prevail - But suppose 20 in the company & one swears to the fact while the others appear & swear they were in the same company & ~~should have observed~~ ^{did not} the fact - ~~but~~ ^{have failed to} that they could not ~~help~~ observing it, if it had been committed. Then the negative would prevail over the Affirmative, for it would be presumed that the other witness swore falsely &c. - The Affirmative must always be regularly proved - & there are cases where the negative must be proved because the Law in such case presumes the affirmative - When a suit is bro't against a Public Officer as for inst. a Clerk of the Court for refusing to give a man a Copy of Record which was his Duty to have done - the Plf. is first to prove the offic^r did refuse & after he has adduced his evidence the Clerk may introduce testimony to prove that he performed his duty & did deliver the copy when demanded. The Law presumes in this case that the Clerk did his duty, untill this presumption is removed.

What the parties have agreed to in the pleadings needs no proof.

The issue is not required to be proved exactly as it appears on the pleadings - the substance of it is all that is necessary - As if an action is

Evidence

brought for cutting a certain number of trees & not guilty is pleaded - the Plf if he can prove that only $\frac{1}{2}$ the number were cut is entitled to a recovery. Or where an action is brought for 20£ & the Dft pleads that the Plf owed him 40£ - if it should turn out on evidence that the Plf owed him only 20£ or any sum over ~~that~~ 20£ whether it falls short of the sum in the plea or shoots over it is immaterial if it is sufficient to callan the Dfs demand the Plea is good & the Plf is not entitled to a recovery. Again where Unury is pleaded ~~viz~~ that the Plf reserved more than 6 per cent viz 10£ the plea is traversed & the jury find ^{bring} that only 7 or 9£ was reserved, yet they will ^{bring} in 'Unury' for their verdict. If what appears on the part of the Dft is sufficient for a complete defence, altho' not in the same terms as he expressed himself in his plea yet he does not lose the benefit of his plea but it is a good defence. —

If evidence is adduced which you suppose falls short of proving the issue on the part of your antagonist, you can as usual leave it to the determination of the jury, or if you chuse demur to such evidence and if it be written evidence there must be a joinder in demurrer. — If you judge the evidence as coming from a wrong source as an interested person &c or if you judge

Bail

176.

judge is impertinent to the issue, object to the admission & if admitted file your bill of exceptions to the opinion of the Court admitting such testimony which must be stated & if coming from a wrong quarter, you must state the circumstances of the witness.—

Lecture 33^d March 8th 94

Of Bail

Of Bail as under the Law of Connecticut.

The Law of Bail in Connecticut is the best system that is known of & if well understood will lead to a thorough knowledge of Bail as it prevails in the other States & in England.

Bail includes all cases where a man is bound for the Pl^t in a suit to pay costs in case he does not maintain his action, or for the personal appearance of the D^f—

The Pl^t must procure bonds for prosecution so that if he should not be able to respond the price of costs when the judgment is against him, the D^f or may come upon the bondman, & this provision of the Law is for the prevention of vexatious suits. The Bondman acknowledges himself bound for a sum sufficient to discharge the price of costs in case the Pl^t should fail to support his action & his property should be insufficient to pay the costs. The Constable is to look for the Pl^t's prop^y & if he returns a non est & does not choose to take his body, the D^f may then bring

Bail

his action against the Bondsman either a *Scire Facias* or an action of debt on bond at his election. But let the bond be as large as it may the recovery is only commensurate with the costs. In case of a summons if the Plf belongs out of the State he must procure bond to secure a bill of cost whether he be poor or not. but it is the practice here not to require bond of a man who lives in this State where it is evident he has property sufficient when a summons issues. But in all cases where an attachment issues the Plf must ~~give~~ give bond, rich or poor. & a writ of Attachment cannot issue without bond. An idle practice has obtained here not by any means warranted by the Stat for the Justice to take the Plf's own bond. This is certainly perfectly futile & unavailing for the execution will answer all the purposes of such a bond & indeed more. The original & true idea was that if the Plf chose the harsh remedy of attachment he should give bond not only to secure the costs alone, but for the damages the Deft might sustain in being abused by a vexatious action. But the practice now is only to take bond for the costs only.

In every case where a man appeals from a lower to a higher Court he must give bond & procure somebody to join with him. His own bond is never sufficient. The condition of the bond is that he make good all damages if the other party prevails. - This bond is sometimes a security for costs & sometimes for the debt also - Ordinarily it is only a security for costs. As if an appeal is made where the ~~Plt~~ in the judgment below was to have 100£ for his if it is confirmed in the upper Court it is easy to see that all the damage the Appellee has ^{by the appeal} sustained is the costs & there were all the bondsman bound himself for. There has been a dispute whether such bondsmen are bound for former costs as well as those subsequent to the time the appeal was made - & the Court has decided that he should be liable for the costs previous to the appeal's being made - with how much reason is another question.

When the Bondsmen is liable ^{for} debt as well as cost. This happens where the appeal is not prosecuted by the appellant. We have seen that the condition of the bond is that the Bondsmen make good all damages &c. & it certainly is an important injury to the ~~Plt~~ appellee to fail of prosecuting the appeal - for by the appeal he has

Bail

lost all benefit of the former judgment it being the nature of an appeal to extinguish the judgment below so that no execution can issue from it. Where the Appellant carries thro the appeal the bondsman can be only liable for costs, but where he fails to prosecute then for debt also — It is a doubtful unsettled question whether, if the Appellant should become a Bankrupt after the appeal, the bondsman should be liable for both debt & costs. When we examine the nature of the bond it is most natural & reasonable to suppose that the Bondsman should be liable, for he was to 'indemnify the Appellee for all damages in consequence of the appeal' & it is easy to see that had the appeal not been made the appellee might have obtained his debt yet the current of opinion seems to be the other way — it being said to be a misfortune happening while the appellant was ^{legally} pursuing his rights. But the strength of this argument may perhaps be questioned.

Of Bail on Arrests

This is of 2 kinds 1st "Bail to the Officer" for the appearance of the Deft on the first summons & 2nd Bail given to the Court after the Deft has complied with the original summons. The former is called Common Bail & the latter Special.

Of Bail to the Officer on arrest.

It is the duty of the officer in such case to take a sufficient bail for the appearance of the Dft at Court & if he does not take sufficient bond he is liable at the suit of the Creditor. If the Dft fails to appear the Bond is not yet forfeited certainly - judgment may go against him & his prop^y attached, or the Dft may deliver himself up during the life of the execution, or the the Bondsmen may ~~be~~ ^{be} compelled him to appear & in all these cases the Bondsmen is clear. The Officer may also take the Dft on the execution which is in effect the same as tho he had surrendered himself.

But if the Dft neither surrenders himself nor is delivered up by the Officer & a non est is returned both as to his body & property, then the bond is liable for Debt & costs. This is an admirable provision in our Law, to suffer the Dft to remain at home managing his business & providing for his family instead of being confined ~~in the~~ ^{in the} ~~place~~ of prison & this with no disadvantage to the Dft in the suit.

Of Special Bail or bail to the Court.

If the Dft appears in Court on his summons he is then in the protection of the Court who deliver him to the Sheriff yet that he may be still at liberty the Law allows him to ^{procure} ~~give~~ bonds for his appearance at the rendering of judgment & if he fails

Bail

to appear the bond is not of consequence forfeited, provided he surrenders himself during the life of the execution &c &c In the English Law the privilege of the Offt is extended still further for if he does ^{not} surrender himself during the life of the execution &c a scire facias is brot on the bond & if the Offt be surrendered up before judgment is rendered on the scire facias the bond is discharged upon payment of costs — //

Whether the Bail is liable or not depends upon the return of non est inuentus. & with respect to this there is frequently much fraud practised the officer by taking advantage of a time when the Offt is not at home, may return a non est unfairly. & pretend the Offt. was not to be found. In such case if it appears that the Offt. had any hand in obtaining this fraudulent non est the bond is discharged but if there appears no fraud on the part of the Offt. the non est being returned fairly by the officer ^{own fault} ~~own fault~~, it seems to be law that the Bond is liable, however unjust it may appear yet the bondsmen has his remedy against the officer. — If the officer has taken insuffic^t bail he is liable with a single exception if the bondsmen was apparently in flourishing circumstances when he became bail the officer is exoner^d but after ~~the~~ becomes a Bankrupt the officer is

very justly exonerated.

When the officer has taken Bail & the Def. does not appear, the officer must assign over the bond to the Plf. that the action may be bro't upon it. It is the practice to bring the suit in the name of the Officer, tho' it is apprehended ^{not} to be an ~~unwarrantable~~ practice the proper method

The mode of recovering upon a bail bond is by action of Debt on bond, or by a scire ^{orig. d. p.} facias, & the rule of damages is the Debt & costs.

Of other Bonds in the nature of Bail.

When property is taken by attachment it may be released by bond, as well as the body. When bond is given in such case, the property attached ^{is} ~~may be~~ replevied the bond is entered on the writ of Replevin ~~to hold~~ it is to respond all damages. This again is an excellent provision that the Farmer may keep his Oxen & Farming implements & the tradesman his tools ^{when attached} till execution is issued against him. Then if non est is returned the bond is liable.

If an attachment issue for 100£ & an horse only valued at 20£ is attached & replevied & the Plf. becomes a bankrupt, there has been a ~~question~~ question whether the bondman is liable for the 100£ or for the value of horse only. Nothing can be more simple & easily solved than such a question. Look at the nature of Bond it is to answer all damages.

Bail

The Plf has sustained in consequence of his having delivered up his lion upon the horse which he held as a pledge by ^{the bondman} ~~his~~ interfering & giving bond Enquire what those damages are - 20L clearly for that was the value of the horse that was attached if this was the only damage, why make the bond man liable for more - The question however is as yet unsettled & the dispute arises from the expression in Statute tho the spirit of it is supposed by Mr Reeve to be clearly in the bondman's favor.

Of a Bond upon a Writ of Error.

This also is in the nature of bail - Our Statute formerly required no bail upon a writ of Error. a Stat however is lately made which regulates the proceedings upon a writ, if a bond is entered upon a writ of Error the execution obtained in the lower Court is superseded & extinguished but if there is no bond the execution remains in force & if the Plf in Error absconds the bond ^{before taken} is liable to respond damages.

Bond upon Audita querela

This Bond is of the ^{same} nature of a Bond upon a writ of Error but different in its operation. As where a judgment is rendered against a man for a debt & the officer levies the execution upon the debt & commits him to jail - The debt says he has discharged the debt & may have an audita querela. This discharges the debt from jail

tice the sitting of the Court where the question is tried & if the *audita querela* is well founded the Plaintiff recovers damages - But he must have obtained a Bondsman so that if the *querela* is ill-founded & he is unable to pay the Costs his Bondsman may be liable -

Lecture 3 1th March 10th 1795

There may be instances in Connecticut where one party will have 2 securities for his costs - This must be where an Appeal is made. The Bail on appeal we have seen is liable for debt & costs in case the appeal is not prosecuted & for former costs previous to the appeal & the Special Bail is also liable for the costs previous to the appeal so that the Appellee has a concurrent remedy he may obtain his costs at the lower Court out of the Special Bail or he may recover the whole out of the Bail on Appeal - or if the Appeal is prosecuted ~~then~~ ^{the case} will be the same only the Bondsman on appeal will be liable for costs only & not for the debt -

English Bail

Of the Power of the Bail over the Prisoner -

In England when a man's body is arrested & a bond is given, the Bondsman takes a piece of paper upon which the Bail is mentioned called the Bail piece. The use of this is that when

Bail

The man for whom he is bound is about to escape or has actually escaped, the ^{bondsmen} may retake him & commit him to prison by showing his Bail piece & no one has a right to rescue the prisoner any more than if he were taken by the Sheriff. But if he has no Bail piece he has no authority to take the prisoner & any person may rescue him. In Con. we have a Certificate from the Clerk of the Court of the ~~same~~ nature of the English Bail piece. But it is unnecessary the prisoner may be taken without it. The Superior Court have decided that the certificate was not necessary & yet that those who refused to rescue the prisoner were justifiable where there was no certificate. For as the bondsmen appeared to have no authority the rescuers had reason to suppose their neighbour was taken by illegal violence.

In Eng. Bail is ~~almost~~ universally taken on ~~Verdict~~ process only & not on Execution, tho in certain cases where a Writ of Error is pending the Court of Kings Bench will take bail.

Bail is taken by a Judge or by an Officer. When the D^f is about to bring a suit, the D^f may go with him before a Judge & he will take bail for the D^f's appearance. This must be by the consent of both parties.

As in Com. the Officer is obliged to accept of bail if sufficient & if he refuses he is liable to an action & it has been a question whether it should be an action of *Trespas vi carmen* or an action on the Case but now settled to be the latter & this is Law of Com. Bro. Car. 196 2nd Sarrind. 59. Vent 55. 85 Salk 98. 2 Ray 425.

This bond is assignable to Plf. & the Plf. sues in his own name, tho in Com. we have seen the practice is to sue in the name of the Officer. If the Plf. dislike the security he moves the Court that the officer bring in this body of ~~Plf.~~ & the Sheriff is amerced & proceedings stayed against him till he pursues his remedy against the bail 1 Vent 85. 2 Ray 399. Str. 423.

The principle of our Stat is the same in substance, tho' different in the mode of proceeding. The Sheriff is not amerced but if the bond is insufficient he is liable to an action & Of Common Bail & Special.

The Eng. Com. Bail is different entirely from what we denominate Com. Bail. Theirs is merely nominal Rich^d Roe & John Doe. & the same is the Com. Bail of New York this is taken where the debt is under 10^l. In Covenants &c & all debts certain above 10^l. Special bail.

is taken, but not common only in actions of Slander, trespass, Assault & Battery &c in all which cases the damages are uncertain. Yet frequently when Bail is given to Count tho the action found only in damages yet if it is measurable that the damages if any thing will amount to more than 10^l Special Bail will be taken tho in an action of Slander no instance is known of Special Bail being taken. Sid. 276. 307.

Roll. 393. Lev. 39. No Special bail is taken in an action on a General Statute.

An Executor is not holden to Bail & his body may not be arrested.

In an action against Husband & wife they may both be arrested & if the husband creeps out of jail any way the wife must also be let out &c.

Of the Proceedings on Bail

When a non est is returned a scire facias issues against the Bondsmen. Upon the Officer's return of Scire facie if the Bail is brot in the bail is discharged. Or if one scire facias goes out & a return of a non est is made & a 2nd issues with a like return yet if during the life of the execution 60 days on the last scire facias the principal appears

The Bail is exonerated.

The death of the Principal before the return of the Execution against him is a discharge of the Bail.

There is an Authority in Barnes' Notes page 80 to prove that the Officer, if the Bail was sufficient when he accepted of him but afterwards became a Bankrupt, is not liable -

If the Off neglects during two terms to file his Declaration the Bail is discharged.

Where Bail is taken in B. R. it is for what shall be recovered but Bail in Com. Pleas for a certain sum.

When Judgment has been rendered in favor of the Debt & afterwards that judgment reversed it has been a question whether the Bail was discharged. The reasoning in favor of the discharge is that by the judgment the bail was discharged & therefore the liability of the bondsman never can revive, by the old maxim that when a right is once suspended it is extinct. On the other hand it is said that the reversal completely wipes the judgment out of existence & Cro Jac. 45. Moore 350.

Defence of the Bondsman

- 1st Defence - That the Principal surrendered himself up
- 2nd That he was taken in Execution -
- 3rd That no Execⁿ had ever issued against the Principal.

188.

Bail

Law. Merch^t

1. Satisfaction of the Judgment, or if reversed
That there was no judgment nor trial record.

Where judgment is obtained against both
Principal & Bondsman the Pl^t may sue
out which he pleases Cro. Jac. 320.

Where there are several Bondsman, all
or either may be sued 1 Lev. 226.

If the Pl^t sues out exⁿ against the Bail
& gets no satisfaction, he may then sue out exⁿ
against the Principal Cro. Jac. 549. Wils. 107.
Dent 315.

Lecture 35th Of the Lex Mercatoria, or March 11th 94. Law Merchant

The Law Merchant^t is a rule^{of conduct} observed
among Merchants respecting Mercantile mat-
ters. It is not confined to any particular nation
but consists the Rules of it are observed by the
Merchants of ^{the commercial} ~~all~~ ^{of Europe & this country} nations. It is not properly called
a custom of Merchants for this would bring it
~~under~~ make the Law Merchant merely, ^{a local usage} an ex-
ception to the principles of Common Law, as the
custom of Gavelkind &c. indulged by the parti-
cular favor of a Legislature to a particular pro-
vince but it is a Law governing a ^{separate} ~~whole~~ class
of men, Merchants & concerning a particular
transactionsⁱⁿ Mercantile & is independent of the
principles of Common Law. It is true, there are

are certain contracts not made by Merchants nor upon commercial matters which are governed by the Law Merchant. as Bills of Exchange & Policies of Insurance. The Law Merch^t is a General Law of the Land & not to be proved as Customs are in different places & if there is any variation from this general law such variation is a custom, & proveable like other customs and are to the Law Merchant what Customs are to the general Com. Law. The Law Merch^t is a much more that grown up much later & is a much more rational system than the Com. Law. The principles of it are collected by judges from the usages of Merchants by Courts & their adjudications are the Law Merch^t when relating to commercial transactions. And sometimes Stat^s have interfered but Statutes are not the foundation.

Courts when judging according to the Law Merch^t are never fettered in the least by the Com. Law. The Law Merchant differs from the Com. Law in these several respects 1st No consideration is necessary to the validity of a contract. 2nd Any fraud in the consideration wholly abolishes the contract. 3rd A release of any kind unattended with satisfaction; given to one partner is no release to the other. 4th Parol evidence is admissible to vary the operation of a writing.

& this where there is no fraud - 3rd There is no ^{right of ownership} *ius accrescendi* among joint Merchants.

Of the first "no consideration is necessary." At common Law there must be a consideration & a peppercorn is sufficient but what reason can there be why "no consideration" should not be as good as a peppercorn? The Law Merchant has exploded this inconsistent doctrine.

Of the 2nd Difference - The least fraud in a commercial transaction vitiates & renders it void - when at common Law fraud in the consideration of a contract does not make it void but the party is driven to Chancery to obtain relief. A mercantile transaction must be pure & undulterated & *suppresio veri vitiat ut as much as suggestio falsi* It may be remarked however that the concealment of a man's speculations in his own brain, tho' by this means he may happen to obtain an advantage in a bargain with another, yet there have no influence in vitiating a contract. for ins. A man has a ship in Europe & from the accounts in the public papers he has determined in his own mind that war is inevitable between a European power & this country & immediately has ^{his} vessel insured without communicating his sentiments

to the Insuring Master. This would not vitiate the insurance, it being a matter of hazard for the Insurer had the same facts before him & probably might have been determined in his mind that no war would take place. But if the Owner of the Ship, had received private intelligence of a declaration of war & concealed this from the Insurer it would completely vitiate the policy of Insurance.

Of the 3^d Difference - It is a principle of Common Law that where there are two joint Debtors & one obtains a release no matter how with or without any satisfaction, the Release is good as to both. But this is totally different from the principle of the Law Merchant. For by this system if one joint Debtor obtains a release unattended with satisfaction, it is no release to the other, but the Creditor may at any time release the one & hold the other.

Of the 4th Difference - It is a maxim in Common Law that no parol proof is admissible to vary the operation of a writing. But in the Law Merchant this is done wherever it appears that justice requires it. tho this is a very vague principle & there is great difficulty to draw the line where to admit & where to shut out. So that this alteration from

The Com. Law is apprehended to be no improvement.

Of the 3^d Difference - The Jus accrescendi or right of Survivorship which prevails in the English Com. Law is unknown to the Law Merchant. But if one partner dies his Estate descends to his Executor & this is the Com. Law principle of Connecticut. The Ex^r of the dec^d partner ^{145.} is in all respects tenant in common with the survivor with the exception that the survivor has the sole right of suing & he alone is liable to be sued. The old authorities maintain that the Executor might join in suits but as the Law now stands he cannot & this is owing to the form of the actions. The Ex^r may release & receive debts & take property &c as a tenant in common.

^{144.} When the survivor has sued for a debt & received he is liable to the Ex^r in an action of account for one half of the money. & when the Ex^r of the dec^d partner has papers which the survivor has a right to & will not deliver them up he may be compelled in Chancery to deliver them to the survivor that he may have the means of settling his accounts properly.

If both partners are dead leaving Ex^{rs} the Ex^r of the last dec^d partner is alone entitled to sue & alone is to be sued just as we have already seen the survivor was.

If however both Partners die at the same moment-actions may be brot by both Ex^{rs}. If the surviving partner becomes a Bankrupt the Ex^r of the Deed Partner is liable to a suit in Chancery, tho no reason can be given why not at Law. A Judgment debt against the Survivor is a Partnership debt 2 Vern 263. Salk 444.

Formerly if there was an execution against a Merchant in Partnership, as a private man & not as Partner, the Officer was first bound to search for private property before he could come upon the joint estate. But the practice is at present to levy on either the private or partnership property at the Officers election. The property when taken is sold at Vendue & the vendee bids off the goods at half price & becomes a tenant in Common with the other partner as to the goods purchased by him & the property is by this means ^{Salk 392.} kept together undamaged & there is no disadvantage to the other partner arising from the property being sold under value. Formerly it was the practice for the Officer to sell the estate to the amount of double the sum sued for & deliver over the one half to the other partner & the other 1/2 to the Creditor.

Where 2 Merchants are in Partnership they possess 3 different estates - each one's private property & the company property. When the Property is sufficient in each several part to discharge the private debts out of the private property & the company debts out of the company property - this must be done.

A & B are in Partnership B is worth no ~~private property~~ ^{not being} & the company property is insufficient to discharge the company debts. A has private property more than sufficient to discharge his private debts. These must first be paid & the surplus of his property is a fund for the company creditors. But if the Company property ^{more than} is sufficient & A's private property will not discharge his private debts the private creditors may come upon the Company estate.

These rules are applicable to our average Law
Lecture 36th March 13th 1794

Of Bills of Exchange & Promissory Notes

A Bill of Exchange is a Letter to a man requesting him to pay over money to a 3^d person, or his order - i.e. to this 3^d person or such person as he shall appoint by endorsing the Bill.

that is by writing his (the third person's) name on the back of the Bill. The writer of the letter is termed the Drawer. The person to whom it is written, the Drawee - the 3^d person to whom the money is payable the Payee. If the Letter is accepted the Drawee is called the Acceptor. If the Payee endorses it to any person such person is the Endorsee. & whoever has the Bill is the Holder.

Such Bills are either payable at sight that is as soon as delivered to the drawee - or after a certain number of days, or months - or more frequently at Usance or double usance. 'payable at usance' means at a certain length of time, ^{after the date, different} according to the usages of different places. In England the usage or usance is at 30 Days from the date of the Letter. When payable so many months hence Calendar months are meant always. After the Bill becomes due 3 days of grace are allowed & if the last day of grace happens on Sunday it must be paid on ^{the} Saturday before the Monday after will not do. Tho the 'Com. Law principle is different from the Law Merchant' in this respect - Upon a Bill payable on sight there are no days of grace.

196.

Law Merchant

See
Beaveson
Law
Merchant

Formerly there was much dispute about the words "date" & "day of the date". The idea that anciently prevailed was that the expression "so long from the date" the day in which the Bill was written was included & that "so long from the day of the date" excluded the day in which it was written. In a case in Cowper 714. This doctrine is discussed & settled. Lord Mansfield gave it as his opinion ^{that they meant the same thing} that as authorities on the subject were contradictory the Court had a right to settle the doctrine as they thought reasonable & said they should consider it inclusive or exclusive as they pleased, & as justice required, or as the intention of the parties appeared to have been. If it could be consid^d exclusive it might work some mischief in England in a contract of freehold estate for the estate in such case would be commencing in future & ~~void~~ this old maxim would be over-
set at once. This however is the Com. Law. ⁱⁿ The Law Merchant The expressions "on the date" or "the day of the date" ~~are~~ both mean inclusive. 2 Raym^d 281. Str. 829.

Promissory Notes are a direct engagement in writing to pay a certain sum at a certain time limited to a person mentioned in the Note or his order & frequently "to the bearer" ~~generally~~. In Eng. these are made assignable by the Stat. of Ann. Before this Stat. they were consid only as evidence of a simple contract & were not negotiable. 1 Salt 129. 2 Ld Raym 737.

In Con. ~~the~~ Stat of Ann has no operation. Notes of hand are not negotiable.

The County Court in Vermont have decided in several instances that Promissory notes are negotiable & Judge Chipman of ^{the} ~~that~~ State has written a treatise in support ^{of} ~~of~~ the idea that they ^{ought to be} ~~are~~ negotiable ^{on principle} ~~and~~ generally at Com. Law before the Stat of Ann & has urged many reasons a convincing one at least I believe in favor of his opinion.

In Con. several attempts have been made in the Gen. Assemb. to make them negotiable but unsuccessfully.

Any person besides a Merchant may bind himself by a Bill of exchange - It has been

been a question whether an infant could bind himself by a Bill of exchange? He ^{may} might by a Promissory note before negotiated But to suffer an infant to be bound by Bill of exchange or a Promissory note after negotiated would completely defeat the Law in favor of infants - for all enquiry into the consideration of Bills of exch. &c is precluded & to suffer an enquiry into them in any instance would make men suspicious of taking them & soon stop their free circulation. Carthew 82. 160 - 2 Vent. 292. It has been a question also whether ^{my consideration of} if the Bill was expressly for necessaries, the infant might bind himself? It is extremely evident that he ought not for were this the case all infants who wished to contract would express in the Bill that the consideration was for necessaries & as no enquiry would be allowed into the true value of the necessaries the infant would not be protected, but the Law in ~~this~~ favor totally counteracted - infants would be just as liable to be imposed ^{upon} whether the Bill was expressed to be for necessaries or not.

When there are joint traders a contract made by one is binding upon all. 1 Palk 126.

There is one difference to be remarked between Bills of Exchange & promissory notes in the former the Drawer & Drawee are two different persons - whereas in a Promissory note the writer is both Drawer & drawee - the note being consid^d in the light of a Bill drawn by a man upon himself, accepted by him when drawn. 2 B. & P. 470. 60m.

A note to "one or order" has been decided to mean the same as "to one's order" -

A Promissory note "to one or bearer" renders it negotiable of course, the Bearer, whoever he may be, being entitled to the money ~~on the face of the note by delivery to the Drawer & no endorsement is necessary~~ ^{In other respects} otherwise they are like Bills of Exchange 1 B. & P. 481. 3 Burr 1516. 1 Bm. 452.

Of Bank Notes & Draughts upon Bankers

Bank notes are consid^d as money itself. In the hands of a bona fide possessor, altho' taken from a mala fide possessor, a Bank note is good. A tender of a Bank note is good ^{in England but not here} 3 Burr 554.

Draughts upon Bankers are not so valuable as Bank notes. If the Banker becomes a Bankrupt the pay^r & the payee has called upon him "within a reasonable time" ^{after receiving it} the loss is not

the payee's but the person's of whom he received it. What this reasonable time is, there is much dispute. But ^{this time} is generally fixed in the place where the note is given. What is a reasonable time is a Question of Law. The Jury should find a Special Verdict & state the facts & ^{from} those facts the Judges are to decide the question.

All the cases in the Books are of transactions in Cities, between parties belonging in the same city. 1 Str. 415 & 16. 550 2 Str. 910. 1248. 1175. Law Merch by Beaves 482.

There has been a question whether in an action on a Bill of Exchange or Promissory Note a consideration need be alleged. By the former authorities it ought but it is now settled that none is required to be alleged or proved. 2 Black 445.

Qualities necessary to a Bill of Exch.^d

1. It must be for the Payment of Money.

Str. 1272. 2 It must depend upon the personal Credit of the drawer & not upon any particular fund. If drawn upon a Particular fund it cannot be negotiated. ^{There are instances} where ~~it~~ ^{Promissory notes} have been drawn upon the profits of a fund in the hands of the drawer & could be negotiated. Str. 1211. 762. Doug. 511. 2 Ray 1481. 7. ~~1481. 7.~~ If the fund is in the hands of the drawer of a note, the note is good.

Lecture 37th March 18th - 94.

A Bill of Exchange must not depend upon a Contingency -

It is not only necessary that a Bill of Exchange should be for the payment of money, & depend upon the personal credit of the drawer and not upon any particular fund - But it must not depend upon an uncertain contingency. 3 Wills. 213. L'Esquind 1362. Str. 1151. The contingency of time is not meant - In Bills frequently depend upon this & besides, a time hence, is a certain contingency that will happen - & a Bill may depend on a contingency that is certain to happen & this certainty need not be physical but if it is morally certain to happen the Bill may be good 1 Wills. 263.

If a man should draw a Bill to be paid on the return of a vessel it would not be negotiable, owing to the uncertain contingency of the vessel's returning. tho' if such contingency should happen the Bill would be a good contract & binding between the parties Black Rep 1072. But if the Bill was payable on the payment of a debt due from government, tho' there is not a physical certainty, physical certainty that gov-

Government will pay the debt, yet as it is morally certain, the Bill is a good one & negotiable.

Of the Form of a Bill of Exchange.

The validity of a Bill does not depend upon any fixed set of words. The ^{1326.} ^{1396.} Forms are very various. The requisites that have been mentioned are absolutely necessary. "For Value Recd." is totally unnecessary - for this phrase is only evidence of a consideration & we have before seen that a consideration is not necessary to a Bill of Exchange. 8 Mod. 267. 2 Raym. 1556.

There has been a question whether the insertion of "order" or "Bearer" is necessary to a Bill of Exchange. In those cases where this question would otherwise have been determined have happened to turn upon other points 2^d Willson 253. It is apprehended that Bills are not negotiable with ^{one of} these expressions. The Drawer was formerly supposed to be a debtor to the ~~drawee~~ payee & the advance to the drawer, but this is not the necessary point of light in which to consider it for after the Bill is ^{accepted} ~~drawn~~ the ~~advance~~ ^{advance} is ~~considered as indebted to the drawer the sum~~

3 Bm.
1672.

sometimes

of the Bill. ~~There is an instance of the drawer's recovering of the Bance for not paying after accepting it.~~

Let us for a moment view the Bill as accepted. — As soon as it is accepted the acceptor becomes liable for the sum on the face of the Bill, to the payee, the indorsee, or the holder, as the case may be. The payee may bring his action against the drawer on the drawer's refusal to accept. The holder may sue the drawer, ^{or the drawee} in his own name. & if the Bill has been indorsed thro a number of hands, the last indorsee may sue whom he pleases viz. any preceding indorser, the drawee or the drawer.

The Manner of Acceptance

It was formerly a Question whether the Acceptance should be written or not. But it is now settled that a verbal acceptance is a good one. If the Drawee, when he accepts can be consid^d as promising to pay the debt of another person, it would seem as tho ^{a verbal acceptance} it would come within the Stat. of frauds & injuries, & be consequently void, but it should be remembered that this Stat. does not govern

Mercantile transactions - & altho it should govern them, such promise could not be consid^d as promise to pay the debt of another person, if it can be presumed that the Drawee was indebted to the drawer as is frequently the case. 3^d Bur. 1674.

If the time limited for the payment of the Bill has elapsed before the payee offered it & yet the Drawee accepts it, it then becomes as a Bill on sight.
 In this point see 3^d Bur. 1663. 1 Atk. 1611.
 Salk. 127.

Of Acceptance for the honor
 of the drawer -

If the Drawee refuses to accept the Bill any indifferent person may accept for the honor of the drawer. This acceptor is bound to pay the indorsee or holder, by putting his name upon the back of it, as much as the Drawee would have been had he accepted it. There is no instance at Comm. Law of one man's undertaking for another in this manner.

Not only an actual acceptance but any agreement to accept is consid^d an acceptance where a Credit has been given. 3 Burrow 1663.

Where an agreement has been made to accept Bills, altho' the drawee should after such agreement refuse to accept, yet Bills drawn after the refusal would be good against him.

An acceptance may be binding tho' not according to the terms of the Bill - as for a less sum than the Bill or for a longer time. (2 Willon 9. Str. 618.) as if drawn for 4000£ & it is accepted as to 1000£ &c

Almost any intimation is considered an acceptance. If the person upon whom the Bill is drawn will undertake to write upon it, no matter what the writing is, unless an absolute refusal it is consid^d. as accepted by him. "Presented" & "seen" written on the back of the Bill have been decided as a sufficient acceptance. Of the manner of negotiating a Bill,

When to the 'Bearer' the Bill is made negotiable by delivery - If to "one or order" It must be indorsed either at length or leaving Blank - If it is left blank it then becomes negotiable by delivery & may be filled up by any subsequent holder. If the indorsement was at length the first indorsee must make another indorsement either at length or by blank &c. Doug. 611. 633. Such indorsement may be made at any time before or after the time of Payment of the Bill. 2 Ba. 575 1516. ^{3 Ba.}

Law Merchant

Suppose the endorsement made upon a Blank note before the sums are filled up, the indorser is liable for such sum as he inserted - Doug. 496. - If the acceptor of a Bill should fail & the endorsement was left blank - the last holder could not sue any intermediate holder - but he might bring his action at Com. Law against the person of whom he received the Bill. ^{for money had & received upon the bill} The first may be bro't without filling up the Blank - it may be filled at the Bar. If a Bill had been endorsed regularly by every holder the last holder might recover from any intermediate ^{indorser} holder. Salk 128.

The holder of the Bill may fill the Blank with an order to pay him, or with a power of attorney to collect it - or if paid with a receipt - In the first case the action should be bro't in the name of the holder, in the second ~~by~~ in the name of the indorser. Salk 128. - Ld Raymud 871.

If the acceptor, when ^{the money is} demanded by the holder, burns up the Bill & refuses to pay its contents - in such case the action may be bro't by the payee & the holder is consid^d as his attorney & admitted to testify to the fact of its having been burnt &c.

Law Merchant
Lecture 38th March 15th 94

207

It has formerly been a question whether the omission of "or order" in an endorsement destroys the negotiability of a Bill of exchange. But it is now settled that ^{it will not} ~~no such omission~~ ^{restrains the negotiability} - nothing will do this but express terms restrictive of its negotiability - Str. 457. Bur. 1216. 1222. 1 Black 295. To show that Bills may be restrained See Burrow 1227. in which case the expression "to such a one for my use" was considered a suffic^t restriction Doug. 616. 17915. An infants endorsement is not binding upon him as a contract yet it serves as a link in the chain of endorsements to carry them on & make them all good as to the others who endorsed before or after him. —

We have seen that Bank notes ^{Drafts &c.} coming into the hands of a bonafide possessor altho taken from a mala fide possessor, are good as to the bona fide possessor Bur. 452 - 1 Black. 485. The same rule applies to a Bill with a blank endorsement Doug. 611.

When 2 Merch^{ts} are in Partnership an endorsement by one is binding upon both - but when a Bill is drawn ^{in joint} upon 2 persons not in

Partnership accepted an indorsement by one is not binding upon both. In the Court of ^{Dougl.} 530 Kings Bench an indorsement by one was determined to be sufficient but this judgment was reversed in the Exchequer Chamber.

A Bill to a single woman after she marries the indorsement may be made by her husband. Str. 516.

A Bill endorsed by an Ex^r or Adm^r is binding upon them personally Str. 1260 1 Dougl. 487. & if a payee becomes a Bankrupt his assignees may indorse & bind themselves in the same manner.

When a Bill is payable to one or order for the use of another, the payee is alone known in the negotiation of it Carth. 5. There can be no indorsement of a part of a Bill for were this the case the acceptor & Drawer might be liable to several citations ^{for} the same Bill & see Carth. 466.

Engagements of the Parties.

When a Drawer draws a Bill he implicitly contracts with the payee 1st That the Drawee is a person capable of binding himself by acceptance. 2nd That he is to

be found as described. 3rd That he will accept 4th That he will pay it on the failure of the drawee in any of these particulars the drawer is liable to the payee or indorsee for the contents of the Bill & as it may be for damages & costs.

A Bill may be good where a man only writes his name blank, if it can be proved that he gave authority to have it filled as a Bill Hen. Bl. 313.

A Bill is drawn payable at a future time, the payee presents it for acceptance, before the time limited & the drawee refuses, the moment of the refusal the drawer becomes liable Coug. 55, for it was a debt as soon as the Bill was drawn with the condition of his calling upon the drawee. This evidenced by the case of Bankruptcy, H. 949.

Engagements of the Indorser

Every indorsement is in the nature of a new Bill & nothing but a payment of the money can discharge the indorser. The indorser enters into the same implied contracts with the indorsee as we have seen the drawer does with the payee. The Holder by giving the

Law Merchant

Drawer & recovering judgment is not prevented from bringing his action against any indorser, till he is able to recover his money. He ^{may} pursue his remedies against all the indorsors & the drawer at the same time. It is a principle of Com. Law that where a man has 2 distinct remedies, both shall not be taken, but by pursuing one he relinquishes the other - This principle has been urged against suffering the holder of a Bill to take so many remedies his objection however is easily obviated by remarking that the holder has his remedies upon several distinct contracts & not upon the same contract. But at Com. Law there are exceptions to the above maxim as in case of Mortgages &c.

If the Holder sues one indorser, imprisons him & lets him at liberty, or if he escapes, the Holder has his remedy against any other indorser 2 Bl. 1235

The Holder's Duty

The Holder in order to be entitled to a recovery must, 1st present the Bill for acceptance at or before the time limited

Law Merchant

if any time was fixed & if "on sight" within a reasonable time. 2nd If he presents & paym^t is refused he must give notice to all persons concerned if he would lay a foundation for a recovery against them. If he does not & any loss is sustained by the failure of any person concerned, the loss falls upon the Holder.

If after acceptance, the drawee refuses to pay, notice must be given to the Drawer, if not any loss that may happen by Bankruptcy ^{or} of the Drawee, will fall upon the Holder. The indorsors also must all have notice so that if the drawer fails the Holder may come upon them. Burr. 2670. 3 Burr^d 712. Suppose the acceptance is variant from the tenor of the Bill, notice must also be given of this.

There Cases go upon the Drawee's being indebted to the drawer & the latter ought to have notice that he may recover out of the Drawee &c.

But there may be cases where notice is not necessary to the drawer as where the drawer has not ^{the} effects of the drawee in his hands & is not indebted to him. Burr^d 410. The presumption is that he has effects of the drawer in his hands but if it is in proof to the contrary ^{made by the drawer} then notice was not necessary to have been given.

3rd Whether accepted or not yet at the time limited for payment it must be again presented & if the Bill is not paid notice must be given as before. If the drawee has become insolvent or has absconded notice must be given of these facts. It is not sufficient that the drawer knows of the insolvency & the notice must come from the Holder so that the drawer may know if the Holder depends upon him for the payment 1 Durnf 170. This notice must be given in a reasonable time. As to Foreign Bills it is settled that notice must be sent by the first post. With respect to Inland Bills it is impossible to lay down any rule Doug. 215. Durnf 171. 167.

There has been a case where a Bill was not presented till after the reasonable time had run out & the indorser promised to pay the Bill, but as he was ignorant of the Law, the promise was not binding.

Lecture 39. March 17th 94.

An Indorser must have notice tho the drawee had no effects of the Drawer 2 Durnf 714. A Stat. in Eng. has fixed Inland Bills nearly upon the same footing with Foreign. In Com. we have no such Stat. and are governed by the Com. Law of Merchants as it stood in Eng. before the Statute.

There is no particular form of notice for Inland Bills & the effect of notice for Inland is different from the effect of notice for Foreign Bills. If the Holder does not pursue the Stat. method of giving notice he cannot recover damages, costs &c but may still have the same remedy he had before the Stat. was enacted. An Inland Bill is similar to an Order & differs only in one respect - As to an order the remedy must first be pursued against the drawee before the Drawer &c.

Of Foreign Bills as to the notice given &c.

By the old authorities other notice than by ~~Foreign~~ ^{Protest} would entitle to a recovery but the Law is now established that the notice must be by Protest.

Of Notice by Protest

The Holder of the Bill presents it to drawee & if he refuses to accept, the Holder gives notice to the Notary Public & the Nota. Pub. presents it again to the drawee for acceptance & on refusal draws up a Protest which is a declaration of the facts &c & minutes down the time & all the circumstances, that the Holder intends to recover of the Drawer or the indorser Damages &c. This Protest must be sent by the next Post. The Holder yet holds the Bill, that he may present it again at the

time of Payment & if the drawee then pays all is well but if he refuse, another Protest is sent by the next Post by the Holder & the Bill is sent with it. *Lex Merc.* 460. And if the drawee accepts the Bill variant from the tenor of it the same ceremonies of Protest must be made. If the drawee accepts & is like to be a Bankrupt, a Protest may be made to the Drawer for better security. *1 B. Rayn.* 743. Or if the drawee cannot be found a Protest is necessary &c.

This Protest is to subject the Drawer or indorser as the case may be to the Payment of the damages interest & costs - As to the Damages the Payee has sustained ^{by non payment} no general rule can be laid down. No proof is admissible to show that the Holder, if he had received the money ~~at~~ the day of Payment might have made great profits by it - In different places, different rules obtain. In Eng. they have some rule respectg E. India & Americ. Bills -

By Costs is not meant costs of suit but the expenses the Holder has been at in employing the Notary Pub. &c. *Lex Merc.* 461.

As to Interest the gen. Com. Law rule obtains what interest is to be recovered up to the day in which judgment is rendered. This principle ap

plies to Notes & other contracts upon interest
2 Bur. 1086. If however there was ~~any~~ other ins-
trument given in security of the interest, then
interest on the ~~Bill~~ ^{note} is only recoverable to the
time of signing the Writ - but the instr^t men-
tioned may be resorted to for the other part
of interest.

Of Supra Protest

There are several modes of accepting by
supra Protest 1st Where the drawer desires
the Bill to be accepted on the account of a
third person, he may accept for the honor
of the drawer Lex Mer. 456. 2nd Or if a Bill
comes indorsed, the Drawer may accept for
the honor of the indorser - in these it must be
protested & notice sent to drawer or indorser
as the case may be. 3rd A third person may
accept in like manner for the honor of the
drawer or indorser -

Of the effect of such acceptance as to the liability
of the acceptor for the honor of the drawer

He is holden to all the indorsors - & if for
the honor of a particular indorser to all the
subsequent indorsees - If for the honor of the
drawer the ^{acceptor} has his remedy only against the
drawer - & if for the honor of a particular indorser
he has his remedy against ^{him} ~~the drawer~~ & all prior

indorsors & the drawer. Lex Merc. 457. 8. 9.

When a Bill is accepted it is *prima facie* evidence that the acceptor has effects of the drawer in his hands & if after acceptance, he does not pay the drawer may maintain his action on the Bill against the ~~Drawee~~ Acceptor. 1 Mills 183. If the Acceptor have no effects of the drawer no action lies by the drawer, but the drawee may sue the drawer Doug. 249.

The acceptor may be discharged by the express declaration of the holder, or there may be transactions that prove an implied discharge, but no indulgence or attempt to recover out of the drawer amounts to a discharge Doug. 2367 8. A letter from the holder to the acceptor "That he need give himself no farther trouble, for he (the holder) should look to the drawer" has been consid^d a release.

A recovery of part of the money of the drawer or Indorser, or taking a new engagement from them, is no discharge of the acceptor Doug. 238. in the notes) - If the holder receives part of the money from the acceptor without giving notice to the Drawer & indorsors, it is a discharge of them for this is giving full credit to the acceptor. But if notice is given, it will not operate as a discharge. A Receipt

however, of a part from the Indorser is no discharge of a prior Indorser or drawer
 Ld Raym 744. Str 745. Wills. 262.

It has been a question whether the Holder is obliged first to resort to the Drawer - The former authorities are in the Affirmative but the later show that it is necessary to pursue the remedy first against the Drawer but against any Indorser Salk. 1 Str 441. Ld Raym 443. 2 Burr. 669.

The acceptor, for the honor of the drawer, must give notice to the drawer that he has accepted ~~it~~ if the Drawer approve of his acceptance he need not present the Bill to the drawee - if however, the acceptor hears nothing from the Drawer he must present it to the drawee at the day of paym^t. &c

Lecture 40th March 18th 94 -

Of the Remedies of the parties & what Evidence is admissible &c

It has been a great Question whether an action of indeb. Assump. will lie against the drawee, Drawer & indorser? It is now settled that where there is a privity of contract (as there is between the Drawer & payee, the Holder & indorser) an indebtedness assumpfit will lie.

Formerly in the Declaration it was necessary

to particularize the custom, but since it has become the general law of the land, it is only necessary to state that the contract was ^{1st} according to the custom of Merchants generally. ^{vs.} Acceptor. It must be alleged in the declaration that such an one drew the Bill, directed it to the drawee requesting payment and delivered it to the payee, and that the acceptor accepted the Bill. The indorsee in his action against the acceptor must state, such an indorsement as will give him a title that the Bill was payable "to such an one or order" & that he comes within this description. If the ^{1st} indorsement was ^{given} ~~only~~ blank, the last indorsee might strike out all the intermediate indorsements & declare himself indorsee of the payee, but if the payee indorsed in full & all the intervening indorsements are on the Bill, he must state them all in his declaration. It has always been consid^d necessary to state that the drawer delivered the Bill to the payee and it has not been consid^d necessary to state a delivery from payee to indorsee in an action by the latter which ^{is as} ~~might be~~ necessary as in an action by the payee. This ap-

Remedy against the Drawer

The payee must state that the drawer ^{gave the bill,} & delivered it to him, that he presented it to the drawee, that it was accepted & the manner of the notice it is necessary to state as by protest. After verdict it has formerly been consid^d good without mentioning ~~the~~ any notice but in Doug 654 this doctrine is settled that a verdict does not cure a declaration in which notice was omitted.

There may be cases in which the drawee may bring his action against the drawer - This happens where a Bill was accepted upon the personal credit of the drawer & the drawee must prove that he had no property of the Drawer in his hands - Exception has been made to a declaration by the drawee without stating a promise - but the Eng. Auth. all show that no promise need be stated 1 L Raym 538 Salk 128 Carth. 409. - When a Bill passes by delivery ^{when} payable to Bearer or by blank indorsement & is by such indorsee transferred without any indorsement, no action on the Bill is maintainable against the indorsee by the Holder, yet if the Bill is not paid an action to recover back the consideration given may be brought & such action may be met by

proving that due diligence, to obtain payment was not used, or that notice was not given &c. This action must be bro't against the man the indorsee received the Bill of but not against the intermediate Holders -

An action in other nations besides England are not bro't on the Bill after protest but the protest is evidence of the debt. The following authorities show that all the remedies may be pursued by the Holder at the same time & point out the method of proceeding 2 Black. 749 2 Vern 113. 1 Str. 513. Courts will stay the proceedings if prevented further if any person concerned as the Drawer, Drawee or any indorser will come into Court & tender the money to the amount of the Bill & the costs on ^{all} the suits up to the time of the tender as far as they have advanced. Of Proving Handwritings &c.

In an action by the payee against the acceptor the drawer's handwriting must be proved, but if the action was bro't by an indorsee it would not be necessary. 1 Rayd 444. Str. 946. But if the action is by the indorsee against the indorser, the indorser's hand is to be proved. If all the Holders indorsered their hands are to be proved.

In an action by the Indorsee against the Drawer the Hands of both Drawer & Indorser must be proved. He must show that he has used diligence to obtain Payment of the Drawee, or other acceptor.

In the action by the Drawer against the acceptor, he must prove the acceptor's hand writing, his acceptance, demand again & refusal & his own payment of the Bill. But he need not state that the drawee had his effects for the Law presumes this & ~~this~~ belongs to the drawee to show to the contrary.

If the Suit is brot by the Drawee vs. the drawer, he must state the hand of the drawer & payment by himself & prove that he had not effects of the drawer in his hands 3 Mills. 18. A Bill is accepted for the honor of the drawer. Then there is no presumption that such acceptor has the effects of Drawer & there is no occasion to state this in the action by the ~~drawer against acceptor~~. If however the action is brot by the acceptor the drawer may prove the acceptor had effects &c. & thus defeat a recovery. The protest is sufficient proof of the Bill's not being paid yet it is said that the Bill must be shewn by the custom of Eng.

but it is not the general Law Merchant & it is apprehended that it cannot be done.

The evidence of the hand writing may be by witnesses who saw him draw the Bill, by his confession or by any circumstances of behavior which cannot be accounted for without supposing he drew the Bill. if a Defense.

The drawer may set up forgery as a defense but this may not be proved by a comparison of hands for a person ^{may} ~~must~~ draw a Bill in a very different hand from what they commonly write Mr. 1051. But where the proof comes from confession it must then be by the party to be charged - as if an Indorsee sues the acceptor he must prove the indorsement of the payee. - the payee's confession is not admissible.

If a defense is made that the consideration was illegal it is good between the original parties but by negotiation, the turpitude of the original consideration is purged except in 2^d Instances - A negotiated Bill in the hands of an innocent indorsee where the consideration was usurious or for money won at play in either case is void. In the 3^d of Dunn 418 there is an important distinction made between a contract *malum in se* & *malum in law* prohibita.

Law Merchant
Lecture 11th March 19th 1791

Of Policies of Insurance

A Policy of Insurance is a contract between two men that upon one's paying the certain premium equivalent to the hazard the other will indemnify him against a certain event. The most usual Policies are upon vessels engaged in Commerce. There are commonly Offices set up on purpose to insure. But insurances are frequently made by a number of Merch^{ts} connected with each other & there are called underwriters & each underwriter insures for what sum he pleases. These contracts are never void on the ground of the hazard. Insurances are sometimes made for other things than vessels - as Lives &c. But this practice is forbidden by the Stat. of George 3rd in all cases only where the insured has some interest in the life upon which the insurance is made. Otherwise such interest exists the insurance is considered since the Stat. of George as a mere wager.

At Com. Law wagers & also such insurances were lawful - & in this country the legality of such insurance depends altogether upon the Com. Law of Eng. But notwithstanding this practice was allowed of ⁱⁿ Eng. for a long time & is now considered the Com. Law of the Land, yet it militates against the first principles of Com. Law to which all adjudications ought to be subordinate - If therefore such a case should come up before our Courts, it is apprehended that they might with safety declare the insurance void by recurring back to the original principles of Com. Law That all practices which are against sound policy & dangerous to the ~~real~~ interests of communities ought by all means to be discouraged -

Insurances are also made against fire - This is not strictly a mercantile transaction, nor is it governed altogether by the principles of the Law Merchant. The English Law is that the party insured must have some interest at the time of insu-

rance & also at the time of the accident & any alienation of this interest previous to the accident is a complete discharge of the insurance 2 Atk 554. The policy therefore is not assignable. In all these Policies the insurer is to be liable if burnt by the invasion of enemies, or any usurped power, or by any accident. It has been determined not to be that usurped power 2 Wills. 363.

Ports, Magazines &c & other Public Property cannot be insured for the reasons why see 3 Burr. 1905. A Policy of insurance it is said may be explained by a parol agreement. Salk 445.

Where a Ship is insured "at & from" a place a question has arisen whether the insurer is liable if she is lost in the harbour before getting sail? It is decided that he is liable unless that voyage has been laid aside 2 Atk. 350. The liability begins at the time of insurance & lasts as long as the voyage is contemplated. If an Insurance is for "Ship & Cargo" & the Ship is lost in port before the Cargo is on board, the Insurer is not liable for the freight which would have been ^{acquired} ~~earned~~ 1 Str. 1251.

Wagering Policies by persons uninterested are void by Stat. If however a man has lent money on bottomry bond he may get it insured, but it must be so specified in the Policy. 3 Burr. 1394.

Where a vessel is lost or damaged the person insured may bring his action on the Policy for the whole loss or for a partial loss. If any thing is preserved & this salvage falls short of the freight it is a total loss Br. 1065. The insurer by making satisfaction to the Insured puts himself in the insured's place as to the salvage & is entitled to the prizes taken 1 Ver. 48. If a Ship is captured & retaken & condemned to be sold & a moiety paid to the recaptors the insured may recover as for a total loss, upon relinquishing the Salvage 3^d Ark. 195. There are no instances ^{of a partial loss.} where the insured are obliged to abandon ~~any loss~~ ^{in instances of any very considerable loss} ~~when~~ they have their election to take the Salvage or to abandon & resort to the Policy. A vessel is taken & retaken before she is carried into port & intended to be restored to the owners it is a total loss 1 Will. 191. A Merchant Ship is

taken & retaken the insured may abandon & recover for a total loss before she arrives into port at the port of delivery, but after the insured can recover only for a partial loss. 2^d Bur 1198.

The least fraud vacates a policy - Not only Suggestio falsi, false affirmations, but Supplicatio veri any concealment of fact. Str. 1183. As where the owner heard that the vessel was leaky & concealed this from the insurer - Or an agreement with the first underwriter that he shall not be bound if the vessel is lost & he is persuaded to insure by the owner in order to make others ^{to join in the insurance} willing. 3^d Bur 1361.

But a concealment of a man's own speculation is not consid^d fraud. 3^d Bur 1905. Where the policy is fraudulent the premium must be given back to the owner & the policy to the insurer. If the Ship is lost thro' the fault of the Owner, Master, Pilot or Sailors the policy is discharged - If she is lost before the insurance was made, to render the insurer liable the policy must be expressed 'lost or not lost' - & any deviation from the course unless compulsory discharges a policy, but a clear intention

to deviate, if the Vessel is lost before she arrives at the deviating point; will not discharge the insurer. 12 A. 9. th of Strange.

The Insurer is not liable for things stolen; If Thieves are insured against, They must be public thieves

Where the Cargo & Ship are insured generally without any certain value the underwriters are all liable if more is subscribed than value pro rata. But if the policy ascertains the value, the underwriters who subscribed after enough had been subscribed are not liable & must return the premium.

Lecture 42nd March 20th 1794

A Double insurance is unlawful, unless where the insurers become Bankrupts & are incapable of paying ~~or it may~~ ^{on the same vessel} be or two insurances may be made without intention as where the owner's factor ^{in another country} has the Vessel insured not knowing that the owner had done it himself. In this case both are liable 1st Bun. 489.

If in the Policy it is provided that the Vessel depart with a convoy & this is not done the insurer is discharged 4th Mod. 60. The Convoy in this case must attend the whole voyage Salk. 443. Altho the Departure is

without a Convoy, yet if it is taken at the usual place it is sufficient Str 1265.

If the Convoy separate unnecessarily as to take prizes &c the Policy is discharged but if the separation is from necessity as by reason of a tempest &c it is no discharge.

In the terms of the Policy it is generally expressed "till the Ship is discharged from the voyage. When the Ship arrives if the goods are taken out by the owner in a boat not belonging to the Ship the Insurer is not liable for the loss, but if they are carried in the Ship's boat the ~~policy is not~~ insurer is liable Stran. 1236.

The Gen. rule that a Capture enables the insured to abandon, but not if the capture was only a small hindrance 2^d Brn 683. as when they escaped suddenly or gave but a small ransom.

Tho an insurance against the perils of the sea, thieves &c does not subject the insurer where the vessel is lost or injury is done thro' the mismanagement of the Master, yet when the insurance is against the barrety of the Master as where he runs away with the Ship, squanders the property, embezzles it, or decimates from the voyage without order of

230.

When the Law is ^{subjected} ~~the~~ ^{Merchant} ~~the~~ owners - but mere negligence is not bar-
 rety. A compulsory deviation ^{by the sailors} from the
 course of the voyage is not barrety Mr. 1264.

If the insurance be against embargoes
 or restraints of Princes &c it does not extend
 to seizure for disobedience of the Law as
 for running goods &c

Where the risk is not run the Premium
 must be returned. But if the risk has once
 begun to run the premium is not to be
 returned. Sometimes however a part of
 the Premium must be returned where 2
 Premiums are given upon the same con-
 tract and the risk is run upon one part
 & not upon the other. If an underwriter
 insures a vessel which he knows has ret-
 urned the Premium must be delivered up.
 A year unheared of is sufficient evidence
 that the vessel is lost & then the insured is
 entitled to recover. But if afterwards the
 Ship arrives the Insurer may recover back
 the money paid.

Of Contract by Charter Party

Where a vessel is hired to carry ~~goods~~
 articles of Merchandize the contract is called
 Charter Party & the reward for the carriage
 is called the Freight. A vessel is hired for

so much a month, for a whole voyage
- for so much for the outward - or for the
inward voyage - If the Ship is lost the
freight is lost. The owner loses his vessel
& freight, & the Freighter his goods - But
where the contract is for a certain sum for
the outward & a certain sum for the in-
ward voyage & the Ship performs the out-
ward & is lost in the inward, the freight on
the outward must be paid for if no con-
tract is made respecting the freight it be-
comes due at the port of delivery - but if
by the terms of the contract no freight
is to be paid until the return of the Ship
& she is lost on her return the ~~out~~ out-
ward & inward freight are both lost.

If the Master return without lading, yet
he shall be paid where it was owing to the
Merchant or his factor that she returned empty.

The Master has a lien on the goods
for the freight - If the Ship is not lost but
the goods are damaged & the owner chooses
to take them he must pay the freight. He
is however at liberty to abandon the goods &
recover their value. If he takes any part of the goods
he must take all - He cannot separate the indam-

undamaged from the damaged If he abandons the good become the Master's

If the Ship is disabled when part of the voyage is performed, the Master shall have freight *pro rata* ^{in proportion}. The Master has power to borrow money & hypothecate the Ship & the tender has the Ship for security & the owner & Master are personally liable for the money. The master takes up money for the refitting or victualling a Ship the owner is liable altho the Ship was leased to the Master. The owners are liable for loss occasioned by the Master's misconduct & the Master is again liable to the owners & it is said in ^{Done} The Books that the Master loses his wages, but it is apprehended this is not the case any further than to answer damages - Bar. 58. Salk 440 3 Mod. 322. Bac. 592.

Lect 43rd
March 2nd
1794.

(Of Merchant & Factor

A Factor is a man employed by a Merchant to transact his business for which he is paid according to the nature of the contract. He takes a Commission & if the Commission empowers him to ~~see~~

deal with the goods as his own he may sell them on ^{a reasonable} credit. And if the ~~for~~ pay cannot be recovered for the goods when sold, the loss is the Merchant. If the Commission be to sell & dispose generally, the Factor has no authority to sell on credit even if they are bona peritima. The Factor must account for the goods he receives according to the nature of the Commission & for this purpose an action of account is the only legal remedy but this action is now dispensed with and an application in Chancery substituted as being more convenient. If the Goods were lost or stolen it is a complete defence to the Factor. He has a lien on the goods - he also has his remedy against the Merchant. The lien upon the Goods in his hands is good against Creditors. In this respect the Factor is not consid^d as a Bailee at all events.

In this State we have not ordinarily applied to Chancery to call the Factor to account but have avoided ~~had~~ brot other actions which are concurrent with account as indebitatus Assumpsit.

If a Factor undertake to run goods & they are seized he must account for them.

& the seizure is no defence - If a Foreign Factor run goods not seized, he is allowed the duties in accounting in a suit in Equity - but if done by a home factor he is not allowed the duties for this would be curtailing their own revenue -

It is a question whether the principal shall be liable for the fraud of his factor civiliter By the current of authorities he shall be liable for all the damage done by the factor & there appears but one authority to oppose the idea Cro. Jac. 469. If a Factor sells the goods of his Merchant & purchases other goods with the money & dies, the goods purchased are the Merchant's & not subject to the creditors of the Factor - but if the goods had not been purchased the Factor's money would have been liable to the Factor's debts Salk. 160.

If a Factor sell goods on credit without any authority, yet the sale binds the Merchant for the transaction as to the vendee was bona fide & the Master in such case must look to the Factor - but if these goods were pledged

1178. by the Factor to secure his own debt the pawn-
ee cannot retain the goods in defiance of the Master

Law Merchant

When the Factor undertakes to sell goods on credit, the vendee becomes debtor to the Merchant & not the Factor. but a payment to Factor is good, unless by the express prohibition of the Master to the vendee to pay the Factor.

In some places there is a custom that a Factor when he sells goods shall run all the risk of loss & in such case he may sell on credit.

There has been a Question whether the vendee is debtor to the Merchant or Factor & whether the vendee is liable to the Merchant after being forbidden to pay the Factor. Str 1182.

This is unsettled. The case in Strange is a determination of the Jury contrary to the opinion of the Court. This was a jury of Merchants.

Of Mariners

If the Mariners do any damage by embezzling the property freighted the Master & owners are liable for the loss sustained. There is a rule that if the Ship is lost by storm or taken by Pirates the Mariners shall have no wages & also if they run away L Ray 398.

650-1206. The Law has made particular provision for mariners to obtain their wages. They may all sue in a Court of Admiralty.

Vent & join in one action & this notwithstanding
 146 ^{Let} they ~~bind~~ themselves by a written contract
 1208 on land they have a remedy against both
 Master & owner. The Master however cannot
 1209 sue for his wages in a Court of ad-
 miralty where the contract was made on
 shore nor if he dies on the voyage can his
 representatives.

Bacon's Agr. If part of the property is thrown
 45 overboard to save the rest, the Master, owners
 Freighters & passengers must all contribute
 according to the property they respectively have
 on board. & if the goods are injured in light-
 ening the vessel, ^{or} an average is made. & if
 any property is given to pirates by compo-
 sition to save the rest, an average is also to
 be made. but if the pirates took the goods
 by force there is no average every one runs
 his risk.

When a vessel is taken the Master
 may ransom her at the expense of the ow-
 ner, or if unable to pay the ransom he
 may pledge himself or any of the seamen
 & the owners must redeem them.

13. If the ship or other property is seized, all the
 property on board must average, even if it
 is not the property of the ship, or if it is not
 the property of the ship, or if it is not the property
 of the ship, or if it is not the property of the ship.

Right of Merchants to stop goods sold in transitu

The Consignor may stop goods sold in transitu before they arrive at the hands of the consignee if the Consignee be insolvent. But if the Consignee assign the Bills of Lading to a third person for a valuable consideration the consignor has no ^{remedy} right against the such assignee. This principle of the Law Merchant is variant from the Com. Law. for by the latter if the goods are once sold they cannot be taken but by attachment 2nd Turnp 63.

Of Owners

Where there are a number of owners the majority in property are to regulate. If therefore the Major part agree to send her to sea & the minority are against sending her upon the majority giving security in Admiralty to secure the shares of the minority the ship may sail & the minority have no share in the profits - but if she is sent with^t giving this security the minority shall share in the profits - for had she been lost they would have borne their share. The minority cannot ~~for~~ ^{for} sail send the vessel with^t consent of majority - but may

Law Merchant

compel a sale of the vessel. This can also be done when part of the owners are unable to fit her out &c.

If the Master take good to carry for hire & he is robbed in port under the dominion of the Comm. Law, he is considered as a Common Carrier & liable at all events but if on the sea, the Mercantile Law prevails & he is not liable. Vent 190. 238
 Le Rayn. 918.

Miscellaneous Principles

Lecture 44th March 22nd 1794

1. Cohabitation & reputation of Marriage is good proof in all cases except in an action of criminal conversation Doug. 166.
- 2nd For money mispaid to an agent an action of money had & recd is brot but evidence that the agent paid it over is sufficient to shelter the Dft from the Plf's claim Cowp. 566.
- 3rd An agent who paid money is a good witness that he paid it - Cowp 805. This a notorious exception from the general rules for admission of testimony.
- 4th Husband & wife are not witnesses for or against each other upon a ground distinct from interest. 2 Burrp 208.
5. There is an authority in the 2 Burrp 758 which serves to elucidate the Question Whether an unfair return of non est in ventus by the Officer is conclusive against the Bail.
6. When money has been paid upon an illegal consideration & an action brot to recover it back, the illegality of the consideration is not always sufficient evidence to prevent a recovery by the Plf. Doug. 453.
7. The declarations of a dying person good evid. Leach 308 & 399. 407.

Miscellaneous Principles

8. A Person who has no notion of eternity is no witness. Leach 368.

9. Whoever purchases of a person & pays a full price against which person there is a judgment, of which fact the purchaser is sensible the ~~contract~~ purchase is fraudulent & void Doug. 88.

10.th There is a case in Cowp. 116. where a misrepresentation to ~~an~~ ^{the first} underwriter who there was none to the rest vacated the policy as to all

11. That Foreign Laws must be proved as facts see Cowp. 174.

12. Where one of two innocent persons must suffer, it is a Rule that the person who enabled the 3^d person to do the wrong must suffer. The Case of *Horn & Hartop* & other similar Cases are manifestly an exception to this Rule —

13. In an action of trespass vi et armis against the Sheriff, Evidence that his Bailiff committed a wrong in the execution of his office is sufficient to maintain the action Doug. 42.

14. An action upon a Stat. for a Stat. trespass, evidence of a trespass at Com. Law will support the action but not warrant a judgment ^{for} the penalties of a Stat. 2 Black Rep. 900.

Miscellaneous Principles

15. It is an important & unsettled question whether a witness interested at the time an instrument was executed can afterwards be admitted by becoming disinterested Str. 1253. 10 Bm. 44.

16. Of the Merquity of calling the Subscribing Witness Doug. 206. 89.

17. How an execution against one of a company is to be levied Doug. 627.

18. Whether money is liable to an execution has been a question, but by our Stat. it is extremely clear that it is not for any thing taken by execution is to fold at the first &c to do which with money would be ridiculous indeed (But it is the practice here for of

19. Usury ~~(Fines to take money & apply it towards payment of execut.)~~

A gives B. a note with legal interest & some time after gives B. another note with a reservation of more than lawful interest. After this they agree to put both notes into one. Quere. Does this latter transaction so swallow up the original fair contract as to render that void? In England this principle is settled in the case of ^{Exp. 175} Gray vs Fowler Hen. Black. 462. Altho' the last note would be clearly void, yet as the original 1st contract was legal, it would be unreasonable & an violation of principle that such a contract which was pure when made should be rendered void merely because it happened to fall into bad company.

Perhaps that may make a difference in
this country as it says "all bonds, contracts,
mortgages & assurances to be void & as near as
the Stat. of Am. says "all bonds & assurances
which shall be resorted to more than 10
years be void" leaving out the word contracts.

It is an established principle that no acts of the
parties shall destroy a contract originally good.

A distinction is made in the case of Robinson
& Bland 2 Burr. 1077 ^{32 by Justice Denison} between the security &
the contract. Vir. "If part of a Contract arises
upon a good consideration & part upon a
bad one, it is divisible - but otherwise as to
the security - for that being entire is bad
as to the whole."

A party may justify under erroneous proceedings till rever-
sed but not under irregular proceedings for they are null
and void."

In Eng^d from the delivery of the writ as the ^{statute} ~~what action is commenced~~ against
a person the property of that person to a
amount of the debt is ^{by statute} ~~considered~~ as divested
from the Dft to the Plf. Therefore an ex^r desertant
must deliver over the good to the rightful adm^r before
action ~~can~~ be brought against him or he is chargeable. But other-
wise in this country for the prop^y is not ~~considered~~ so divested

Of Real Property

Began May 26th 1794

Lecture 1st

Notwithstanding it appears extremely easy at first view to define Real Property, yet it is impossible, in any one proposition, to give the Student an adequate idea of it. It may be told that Real P. is "Corporeal & incorporeal tenements" - But this gives as imperfect an idea of the subject, as Aristotle's definition of a Man 'That he was a featherless, twilegged animal' -

The Subjects of Real Property are of 2 kinds - 1st Lands or Corporeal tenements & 2nd Incorporeal tenements - There two general divisions include all Real Property. ^{Land is included} ~~Land is meant~~ all the property which adheres to the ground, as well above as below the surface - usque ad coelum et ad inferos - Houses, Water, Trees, Mines, Artificial Emblements &c &c are Real Property & will pass with a conveyance of the Land.

Real Property

Incorporeal Tenements are intangible, ideal creatures - As a right of way, ^{to life &c} a right to a stream or in Eng. Offices - Land may be conveyed Houses &c may be excepted - In such case it is Mr Reeves opinion the house becomes Personal Prop^y tho this is unsettled by an determination of Courts. The ultimate fee of the Land which the house covers is in the owner of the surrounding Land, but as long as the House stands ^{the ground under it} ~~the use of it~~ belongs to the owner of the house -

When Trees are excepted they are always consid^d person^d prop^y and are governed by all the rules ^{relating to} ~~of~~ personal property. Authorities differ concerning what would be the operation of a grant of timber trees. The general & better opinion is that they are Personal Prop^y. being contemplated as severed from the freehold -

Emblements pass in a conveyance of Land - They are consid^d Real property for the sake of being conveyed with the Land - in every other point of view they are ~~personal property~~ & also to favor criminals that it need not be felony to steal them - In every other view they are person^d prop^y -

The only Estates which a man has in Real Property, are 1. An Estate in Fee simple. 2. An Estate in fee-tail & 3. An Estate for life. In both kinds of real property a man may have a person property - As an Estate for years in Land - or an Estate for years in an incorporeal tenement -

^{On conveyance} A man cannot so conduct with person as to cause it to be governed by the rules of real property - neither with the latter so that it be governed by the rules of the former. Real Property, once find out what it is, invariably descends to the heir & pers^e to the Executor so that it is a matter of no inconsiderable importance to know what is Real, & what Person?

Whoever has an Estate in Fee simple or Fee-tail always has an Estate in Real property - not so with an Estate for life. This estate may be created in person^e prop^y as the use of a Library of Books &c -

It was long unsettled in Eng. what became of an estate ^{per antea} for life when the donee died first. Sometime it was considered as open to the first occupant -

But by the Stat. 1. Geo. 4. it was determined

to belong to the Executor - It is a matter of uncertainty what would become of such an estate in Con. the Stat. of Car. having no operation in this State -

Lecture 2nd May 27th 1794

Of an Estate in Fee simple

A fee simple is such an estate that when given, it is wholly at the disposal of the person named as grantee. He may dispose of it at his pleasure either by deed to operate in his life time or by devise to operate after his death, - & if not disposed of descends to his heirs general - It is created by these terms "his heirs forever" -

Co. Lit. These words are by the English law indis-
p. pensible for a ^{fee} estate to pass by deed -

In a will a variety of other expressions will pass a fee simple. (~~But the law is not for~~
~~technical expressions in both deed & will~~
~~which are absolutely requisite~~)

Formerly an Estate in fee simple, was held under a Superior at will - ~~After~~ ^{When} the Feudal system had begun to shake a little the tenant acquired his Estate for a term of years - After the rigor of this disgraceful system had in some measure abated tenants acquired their estates for life - This estate passed

by the terms "to him forever". But in the progress of refinement the feudal tyranny vanished & holders of fends were allowed to alienate their Estates. So as this they had no terms. An estate to a man forever was only an estate for life - some other terms were therefore necessary to transfer that absolute property, which the Romans called allodial & which we call a fee simple. For this purpose the terms "to him & heirs forever" were invented. These terms give nothing to the heirs of the grantee; ~~as of~~ An estate "to A & B forever" would convey a joint estate - but an estate "to A & his heirs forever" conveys nothing to A's heirs - it being only a technical phrase to ~~vest an absolute~~ estate in the grantee - designate the quantity of the Estate granted viz a fee simple. See Plowd. Mett & Rigden. It would be difficult to support the reason why this phrase should be absolutely necessary, when the idea is expressed ever so clearly in any other words would not pass the ^{test}. It is probable that this absurd notion may yet be rejected by courts when they have shaken off their degrading servility to precedents. Wherever such an estate is conveyed by the terms "to him & his heirs forever" any attempts by which the grantor may endeavor to cleave the estate in derogation of the quality of fee simp.

would be vain. As that the grantee should not alien or devise such estate ~~to~~ for a fee simple was created. & ~~this~~ ^{it} is an inherent quality of such Estate that it may be aliened ~~to~~ by the grantee. So a deed "to A & his heirs forever" remainder "to B & his heirs," the remainder in this case is wholly void. for by the legal phrase the whole estate was conveyed to A. liable to descend to his heirs. Vaughan 269. Cro. Jac. 591. The passing of a fee simple in a Will may depend upon a contingency to a person in remainder & might in a deed (in Eng.) were it not for the maxim that an estate cannot commence in futuro. A fee simple must descend to the heirs general & cannot be otherwise given. An Estate "to A & his heirs forever on the part of his mother." This clear intention of the grantor could not be carried into effect, it being against the rules of Law Co. Lit. 130.

A fee simple may be created in a will by other words than "to him & his heirs forever". The rules respecting wills were established at a much later ^{& more liberal} period than those respecting deeds, which accounts for their difference. Mr. Peene supposes any words will do which prove that it was the inten-

tion of the Testator to pass a fee simple.

The rule is that the intention of the testator is always to be complied with provided such intention is consistent with the rules of Law. (It is important to understand this maxim perfectly) Is it not a rule of law that the words "heirs forever" are necessary to create a fee simple? And that long before real property could be devised? altho the intention is clear yet is it not in opposition to a known rule of law? The answer is - This rule is not applicable to the construction of ^{any} words whatever, but only to the nature of the estate conveyed - for ins - the Law says that a fee simple must be wholly in the power of the owner to dispose of. ~~Let~~ the intention of the Testator be as it may, ~~he~~ cannot alter this quality by any restriction. So personal estate goes to the Ex^r & cannot by a will be made descendible to heirs. So also personal property cannot be entailed no intention can alter the Law. All such cases ~~which are out of the~~ & whatever is out of the power of the testator to do, let him use what expressions he will, no intention shall make effectual. But where the thing intended to be done is in his power to do, in such case the intention

Real property:
governs altho the proper technical expres-
sions are not used - See case of Ambrose vs
Hodgson. Doug.

Lecture 3rd Man 28th 94

The instances which have been de-
termined to carry with them sufficient ev-
idence of intention to pass a fee are -
A devise in fee simple - A devise to a per-
son to pay the devisors debts or the debts
of any person, for it implies a power to
sell to effectuate the devisors intention -

A devise to B, in these words "I give my
farm at C, to B upon his paying 100^l to
D - Had the devise been, ^{the same but the 100^l was made} payable out of
the annual profits, this would not fur-
nish such evidence of intention - "All
my estate" passes a fee simple - But if
words of locality are connected with the
terms "all my estate", as all my estate at
such a place, there is a difference of opin-
ion in the books - The current of authori-
ties are however in favor of ^{the words} passing a
fee simple - "My estate forever hereditarily"

2. Very. 614.	2. App. 524.	} Coups. 306.	
2. Lev. 791.	1. Bump. 412.		229.
2. Atk. 38.	2. 658.		1. B. C. 432.
	3. Wills. 418.		Doug. 730.

111

The terms "all my effects real & personal" have been decided to pass a fee & also "all I am worth." "All my estate in the occupation of such a person" held not to pass a fee in Doug. 730

Of the maxim nemo est heres viventis.

An estate given to the heirs of B conveys no estate to the heirs, if B is living - for according to the maxim no one can be the heir to a living person. The estate therefore is given to nobody, as B has no heir. But if it is apparent that the Testator meant to point out any particular person by the term "heirs" then he may take - as to the heir of B. If B had an only son, it is presumed the Testator meant the heir apparent. Som. Ray. 330. - In every case of a devise to the heirs of a person, ^{that person} being alive, is not the presumption natural that the Testator meant the heirs apparent? The propriety of the Law, therefore, may be questioned -

Of Estates in Tail.

The technical terms to convey an Estate tail are "to one & the heirs of his body?" These are indispensable in a deed. In a Will

any expressions indicative of the Testator's intention to pass a fee-tail, will answer the purpose. "To a man & his issue" are sufficient or "to one & his sons" he then having none.

Origin of Estates Tail

When estates began to be alienated, the pride of the nobility was wounded, & they trembled thro' fear that their estates would be soon broken up by this practice. They longed for some regulation by which to prevent the alienation of Estates & keep that their estates might descend ^{entire to their blood-relatives} ~~for the sake of their noble blood~~. For this purpose they contrived the conveyance in fee tail, thinking this would effectually answer the end for which it was invented. But the intention of the grantor was defeated by the construction of Courts. This gave rise to the famous stat. de donis the object of which was to lock up estates in the blood of the nobility. This stat. was the 13.th of Edw. 1.st This statute ^{it} was completely evaded by the conveyance by Fine, & Common Recovery. For born Recovery was in short this. A wishing to put his estate in a situation to alienate it, agrees with B. to sue him for the land & not to ap-

pear to answer to the suit B then has the estate & is ^{convey} to A a fee-simple. In this way the entailment is docted.

Nature of an Estate Tail

An estate tail is divided into Tail general & Tail Special - The former, is given "to a man & the heirs of his body" generally, without any restriction either in favor of the male or female line - The latter, is restricted "to the heirs of his body by such a wife", or "~~to his heirs female, or heirs male~~".

If it be to the heirs male, the one who takes must be not only male & heir, but must have derived his descent ^{wholly} thro males - otherwise the estate will revert back to the grantor or his heirs - for ins. an estate is given to a man & the heirs male of his body" he has a daughter, who dies leaving a son. This son cannot take his parent thro whom he must derive his descent from the donee in tail, not being a male. If it be to the heirs female - the person who takes must not only be heir & female but must derive her descent thro a line of females - See Co. Lit. 25.

Of the Qualities of an estate tail

It is liable to revert back to the grantor on the death of the donee in tail & failure of issue.

A tenant in tail is not answerable for waste the Reversioner's interest being on so doubtful a contingency that it is considered no thing in the eye of the Law.

His wife shall be endowed as in all estates of inheritance —

The husband is entitled to his curtesy in ^{the} estate tail of his wife —

An estate tail may be conveyed in fee simple & the conveyance is good as long as the tenant in tail lives —

Connecticut Entailment

It was long uncertain what would be the Law of Entailments in Con. Learned Law yers ~~undertook~~ undertook to tell what it ought to be, long before any decision of Court. Some supposed that the old fee simple conditional, that prevailed previous to the Stat. "De donis", would be here revived. Others contended that the Stat. de donis was our Law it being an ancient Stat. &c. — At length however their judgment was relieved by a decision of the Sup-

rior Court. By this determination the first donee in tail could not alienate so as to destroy the right of his heir - and the estate descended to the heir, vesting in him a fee simple. The power of the Court to make this alteration from the English Law was questioned, & to remove all doubts a Stat. was made in 1784 which adopted the idea of the Sup. Ct. Our Entailment differs from the English only in the duration of the Estate - Some have supposed it to be no more than a life estate - But this is not the case for the Legislature have made use of the term "entailment," & this sufficiently shows that they meant to adopt the English Law with the single exception of duration, which they determined should be no longer than the life of the first donee - All the incidents therefore of an estate-tail in Eng. belong to ours with the exception mentioned.

Of a Tenant in tail after Possibility of issue extinct -

This happens where one is tenant in special tail, & a person from whose body the issue was to spring, dies without issue - as where an estate is given A. & the heirs of

to be begotten on the body of his present wife & the wife dies without issue -

The duration of this estate is for life only yet the tenant is not liable for waste as other tenants for life are - & if he alien's in fee it is a forfeiture of the estate Lit. 28 Doct. & Stud. 60.

Of an Estate for life

If estates for life some are created by operation of law & some by the act of the parties - of the former kind are estates in Dower & Curtesy - Estates during widowhood, or while the donee remains clerk of a Court & depend upon the act of the parties, liable to be determined at their pleasure -

If a lease is made without any time limited, it is a lease for the life of the lessee. but such a lease by a tenant in tail is for his own life for obvious reasons -

A Tenant for life is punishable for waste & liable to forfeit his estate - He cannot alien in fee as a tenant in tail may for such alienation is a forfeiture to him in Reversion & the deed is void

It might be a question in Con. Whether this would be a forfeiture; as our circumstances are totally different from those which produced this practice in Eng. — Lords least of their estates to persons in whom they put confidence to assist them &c, & would not suffer stranger tenants to be palmed upon them — Such tenants may take necessary fire &cote, House &cote, &c.

Of a Tenant by Curtesy

To entitle a man to this estate his wife must have had issue born alive who would have inherited — In England there must have been an actual seisin on the part of the wife — But here entry is not necessary. A man ^{may} be as completely possessed without entry as with —

There was formerly a decision in our Courts, That tenancy by curtesy lasts no longer than till the heir comes of age — Some say there have been contrary decisions, but W.R. cannot satisfy himself as to this —

A Question might arise whether a curtesy estate is not governed by the Law of Gavelkind which was the tenure of Kent & the tenure

Real property
of our lands under the Charter? as no
Stat. has made a different provision --
The curtesy in Gavelkind differs from the
Common Law Curtesy - That it is only of the moi-
ety of the wife's Lands - marriage alone with-
out issue entitles to it & it determines on
a second marriage.

Lecture 5th May 30th 1794

Of Estates in Dower under the Eng. Law.
This happens where a husband dies seized of
lands. The wife may take the third part of
all the lands & tenements of which the husband
was seized during coverture, to hold for her
life - The estate must be just as ^{might} be
inherited by her issue. It must therefore be fee
simple or fee tail - The wife is dowable in a
- seizure in Law as well ^{as} actual seizure for it is
not in the wife's power to bring the husband's ti-
tle to actual possession & the husband can the wife's
The wife's title to dower is indefeasible as
to its liability to creditors & tho the husband may
devise away from her all his personal prop-
erty, yet he cannot by devise, deprive her
of her dower. She must not commit waste -
but what would be considered waste in other
tenants would not be in a widow - an aliena-
tion ^{by her} in fee is a forfeiture - The heir must

sets off her dower in 40 days after her husband's death. If he refuses, she has her remedy at Law & pending the action, she may occupy the husband's mansion house. This estate is paramount to all claims ^{of creditors} during her life.

How Dower may be barred

1. By a divorce a vinculo ^{the being the guilty party} matrimonialis.
2. By her elopement with an Adulterer.
3. By jointure settled upon her before marriage. This was effected by a Stat. Hen. 8. The jointure must be competent - it must last during her life, & vest in her immediately on her husband's decease.

If the jointure is determined by ~~the~~ ^{her} husband's ~~decease~~ ^{restraint} to be incompetent, she may resort to dower. When a jointure is made subsequent to marriage, she has her election to take up with that or resort to dower. This on the ground of her being under her husband's restraint after marriage.

Difference between Eng. & Con. Law

In Con. the wife is to have only "One third of the estate of which the husband dies possessed". Some lawyers make a distinction between ~~their~~ ^{the} ~~possession~~ ^{possession} - others say they are synonymous terms - no case has yet come before a Court, tho several are about to. In England if the heir refuses to set off the dower, the widow has to

Real property -

is driven to a law suit for redress. When this is the case, it is generally 2 or 3 years before she can recover her right. In Conn. a great improvement is made in the Law of dower. Here the Ct. of Probate appoint 3 judicious free holders to set off the widow's ~~share~~ ^{& the part immediately into possession} part. The transactions of these men have been almost universally satisfactory. But the heir if ^{he} thinks he is injured may appeal to the Sup. Ct.

A Divorce a vinc. mat. is not a bar except where the wife is the guilty party. A divorce a mens. et thor. are no bar. Dower may be barred by jointure. — By a fair construction of the Stat. jointure may be made in personal property. But this would be attended with many difficulties for in this way a cruel husband might deprive his wife of every claim upon his property — unless it could the personal jointure could be consid^d her separate property as all her personal estate is vested in her husband on marriage. If a husband in sound health is disposed to deprive his wife of dower he may, by aliening his lands &c. This is a misfortune to the woman for which she has no remedy. — But if the alienation is in contemplation

of death, to deprive the wife of dower, it is consid.^d a testamentary disposition, let the nature or terms of the contract be what they may. When property is given to children to defraud the wife, she shall stand in the place of creditors & take her dower —

If in any instrument an estate is conveyed ^{given} to a man for life & in the same instrument, a fee simple to his heirs the fee simple vests in the first donee, as "heirs" is the technical term for conveying a fee simple —

The English principle is — That, in a will if any other expressions can be found plain ly indicative of the testator's intention to pass only a life estate to the ~~estate~~ first donee & a fee simple to his heirs ^{his intention will be followed} yet it appears from the authorities that it is extremely difficult for judges to discover the intention where to a man of common sense it is clear as day light. Where an estate is given to one for life & not otherwise, & the fee to his heirs, the Court made out to discover the intention & the estate passed accordingly —

Also If in an instrument an estate ^{for life} tail is given ^{to one} & in the same instmt an estate tail to the

Real Property -

heirs of his body an estate tail is vested
in the first donee &c &c

See the last case in the 1th of Burrow -
Secture 6th May 31st 1794 -

Authorities for the above subject

1 Rep. 93 - 86	{	Hodgson vs Ambrose Doug-	{	2 Pk. 349 -
Bro. Eldr - 313		2 Atk. 247		
2d Ray. 203		1 - 412		
1 Vent - 231		1 Mm 142		
Bagshaw vs Spencer in Jersey		123		
Long & Leming v Burrows		612		

No Estate of freehold or inheritance by
the English Law can commence in futuro -
A fee simple may be limited in remainder
after a life estate & in this way commence
in futuro - But this intervening estate must
be a freehold & not an estate for years, unless
livery of seisin is made of the whole estate
& then the estate in remainder is said to
commence in presenti, solvendum in futuro,
so that the maxim is not disturbed -

By devise estates may commence in futuro
without any intervening estate - such a
devise is called executory - At how great
a distance the devisee may be & take by
such devise is not settled in the Eng. Law
In Com. it is established by Stat. That no
estate either by deed, or will can com-
mence at a greater distance than to a per-

for in esse, or to the immediate descendant
of such person.

Of an Estate for Years

This is personal property. It is to commence
at a certain period, & end at a certain period.
This estate may commence in futuro.
No livery of seisin necessary to pass it.
Parol leases for 3 years are good but not
for a longer period. ^{no parol lease is good} ~~In Com. a parol lease~~
~~is good only for one year~~ ^{cut off by Stat.} - Suppose a parol
lease is made for a longer period than 3 years.
& the Lessor sues the Lessee at the end of the
term, on the former contract, he cannot re-
cover on that ground. Altho the Lessor cannot
recover by force of the contract, yet he may on
the ground of a promise raised by the justice
of the Law. That the ^{lessee} should pay what is reason-
able for the ^{and occupation} Use of the land. The action is an
indeb. Assump. - It may have the operation of
a written lease, where the Lessee has paid
rent. The Lessor shall not eject him on the
principle that no man shall drive another
out of possession where ^{he} is compellable in
Chancery to make good the title which is the
case in this instance. The tenat by parol
lease defects by committ. waste.

Real Property

Month Estates are considered in Law as year estates. Lunar months are meant.

In Cowper 714 "From the date" & "from the day of the date" are the same, & shall be consid^d. exclusive or inclusive as shall best answer the purposes of justice.

Estate at Will

This amounts to nothing more than a licence for the tenant to go on the land & improve. It is liable to be determined at the will of either party. But the lessee shall suffer no inconvenience by a sudden order of the lessor to go off. The Lessee does not diminish his estate by committing waste & this act of ownership ^{exercised by} the lessor inconsistent with the lessee's tenancy is an end of the estate.

Of an Estate at Sufferance

This is where a Lessee continues in possession after the lease ^{is out}. He becomes a trespasser as a tenant at will.

Emblements

These are the annual, artificial produce of land. They go to the Ex^r. If the tenant has sowed the land before harvest the estate

emblems, unless the term was certain & the tenant knew it would end. in this case it was his own folly to sow & must loose them. — A woman has an estate during widowhood if she has sown, & before harvest marries, she loses the crops but if she has leased, her lessee shall not ~~be~~ be injured by her ~~folly~~ ^{act}. If tenants at Will or sufferance loose their estates by their own act, they loose their emblems.

Lecture 7th June 2^d 98

New York

The Law of England & New Y. are the same respects the terms which create a fee simple only by a late Stat. any words which in Eng. will create an estate tail, will in N.Y. create a fee simple so that entailments are, by one general stroke, completely cut up by the roots.

Estates per autre vie are in N.Y. personal property & go to the Ex^r if not devised.

They have made ^{com} excellent provision to prevent ^{see Statute} widows from being defrauded of their dower.

The widow is not deprived of her dower by the husband's attainder. — Their law of coverture is the same as the English.

Real Property Of Incorporal Tenements

The greatest part of these do not & never will exist in this country, but it may be entertaining to read them in Blackstone & ~~as a part of our~~

Those which do exist here ought to be understood —

Of an Annuity

This may be granted to a man & his heirs forever — The Grantor does not bind his heirs by such a grant unless particular mention is made of this intention. — But he binds himself & to the grantee, & his heirs, if they should happen to outlive the grantor. It is personal property as to the grantor ^{as the duty} & dies with him & descends to nobody — But to the grantee it is real & will not descend to the ~~Gr~~ but to the heir —

~~But~~ The Grantor may bind his heirs, but by this it is not meant his heirs generally — The grant binds none unless they have received assets from the ancestor — It may be an Estate tail, for life or for years Lit. Eok. 144.

Of Rents

We have properly no rents here. The purpose of them is answered by giving notes payable every year — The growing rent goes to the heir who when collected it easily seen it must be personal property — The heir owns the Reversion & the ~~incident~~ is rent is so incident to it that

a reservation of Rent to the L^d was considered nugatory - in Bro. Elr. 288. Where a lease is made by a Lessee, the rent reserved is person property.

There is a practice in Eng. of selling a fee simple absolute & reserving rent, & this rent follows the Reversion wherever it goes ^{Elr. 832}. This may take place here 5 Rep. 111. Car. 289. Latch 253. Lit. 457.

Arrears of Rent have nothing to do with the Reversion - being person property, they go to the L^d. Elr. 575. Talk 598.

Of a Right of way

These may be in fee simp. tail &c. In Eng. they are by prescription. There is no such thing here - But a man may here bind his heirs & assigns to ~~grant~~ ^{grant} a grant of a Right of way & this gives a privilege which will descend forever to the assigns &c. A right of way to one for life is not assignable.

A man may grant away the use of a stream passing over his land - Common law is the law to teach what is right in such cases &c. Lecture 8 - June 9 - 94

Of Mortgages Lecture 8th June 9 94

A Mortgage is a pledge of land in security for a debt. The Mortgage is not for the payment of the debt, but merely a security liable to be redeemed on payment of the debt. The personal security of the Mort-gor being deemed insufficient. The Mortgage is no objection to ^{the Mort-gor's} pursuing his remedy upon the debt for the security of which it is given, even at the same time that he is ejecting the Mortgagor. In whom is the legal title? After the pay day there has been no doubt where it is. Before this time some have doubted - but it is now settled that the legal title is in the ~~Mortgagee~~ Mortggee from the date of the Mortgage. This will appear ~~by~~ reasonable by considering the nature of the deed. It is, in the M-g-ee, an estate in fee simple conditional, liable to be defeated on a contingency. This was considering it before the pay day. After that & failure of the Mort-gor the estate in law, is a fee simple absolute. But in Equity there is a right of redemption. The real, beneficial interest is in the Mort-gor & the land is still consid^d a pledge redeemable at his pleasure.

The decree of Chancery does not operate in rem. So as to give a title to the Mort-gor, for ^{the} title in Law is completely in the M-gee. & Chancery has not power to say that the title shall be the M-gor's.

But the same thing is effected by fixing a large penalty upon the M-gee, if he will not reconvey to the M-gor as will compell him to

The History of this ~~affair~~ is this - When these cases first came up there was no Court of Chancery, & Courts of Law supposed they had nothing to do with contracts so clearly settled by the parties - They therefore suffered the M-gee to hold an absolute fee simple after the pay day & failure of payment - Such great injustice was done in this way by avaricious men imposing upon their negligent debtors, that when ^{the} Court of Chancery was established, they wished to invent some method to prevent fraud of this kind - They thought it would be too presumptuous in them to alter ^{the} established title in direct terms & therefore took the round-about method of decreeing that unless the M-gee would convey he should forfeit a penalty which they would fix high enough to compel a conveyance. ~~This decree was paramount to all other titles.~~

Payment, or tender of Payment ^{before the pay day}, reverts the title in the M-gor - but his situation is critical for he is to prove the tender of payment, while the M-gee has a deed of the Land - The title therefore frequently is not in the deed, but depends upon a matter of fact to appear in evidence. ~~The tender is~~

Of Mortgages

If the M-gee was in possession at the day for redeeming, the M-gor might bring his writ of ejectment, ^{before a Court of Law} & in this way the title would be tried. If he proved against the M-gee, the M-gee would ~~lose~~ ^{give} in him the title. But if the M-gor had remained in possession, there was no way for him to try the title before a Court of Law. Chancery must then be applied to. They would order the M-gee to reconvey on penalty &c. & if he was unable to pay the penalty, the Court would quiet the M-gor in possession, by decreeing ~~that he should~~ the land absolutely ~~and~~ declaring that no man should disturb him. This decree operates in rem & is paramount to all other titles.

If the M-gee should bring a writ of ejectment against the M-gor, this would answer every purpose for the trial of the title would come up.

The reason why Chancery took up these matters was on the ground of their power to compel the execution of trusts. They considered the M-gee as trustee to the M-gor.

Chancery fixes a day on which the M-gee shall reconvey & on failure the penalty is forfeited & this is never chancered.

The M-gor is not liable for rents, altho the title ~~of the land~~ is the M-gee's. For the land is only a pawn for a debt on interest, & no injustice is done to the M-gee.

The M-gor remaining in possession depends entirely upon the will of the M-gee. In this light the M-gor is a mere tenant at will, but is different from ~~that~~ ^{such tenants} in respect to the Emblements. There the M-gee takes when he enters. His going into possession, however, has no effect upon the debt, for he is liable to account for the rents & profits to the M-gor & if these overgo the debt he must pay the balance to the M-gor.

The M-gee shall be allowed for such improvements as are useful to the M-gor, ^{with interest 3.4% 5.18,} but if he has built an elegant house which the circumstances of the M-gor did not require, or otherwise laid out an unnecessary expense he shall not be allowed any more than what ^{would} have made the necessary improvements. It is difficult to determine at how much the profits shall be computed as some would raise more than others. The M-gee however must have acted a ^{prudent &} reasonable part, or the profits will be computed higher than he has received. All the circumstances are taken into consideration, as the M-gee's negligence, what the land could have been let for, &c, &c.

The Equity of Redemption is so incident to a mortgage that it has given rise to the Maxim "Once a Mortgage, always a Mortgage." All agreements to have it irredeemable, on condition of the M-gee's paying a greater sum &c &c are idle.

Lecture 9th 1879 June 10th

Sometimes the condition to a m^g is attached to the deed itself. Sometimes a separate defeasance is given by the m^gee. There are equally good betwixt the parties but different as they respect the purchaser. For as the m^gor keeps the Defeasance & the m^gee the deed the latter might be recorded first & thus deceive purchasers as to the title &c. When the condition is attached to ^{the} deed, whoever buys of the m^gee takes it with the incumbrance of the m^gor's right of redemption but when a separate defeasance was taken & the land aliened by the m^gee the m^gor must file his Bill & Chancery will decree that the ~~purchaser~~ ^{m^gee} shall either reconvey to the m^gor, or forfeit a reasonable penalty about the worth of the land. The ~~purchaser~~ ^{m^gee} has his election which to do if he pays the penalty the land is inalienable. This is an exception to the Maxim "Once &c."

The m^gor may sell his Equity of Redemption if the m^gee purchases it, the Mortgage is defeated & the old maxim again broken in upon 45 Vin. 468 1 P. Can. by Brown.

When a man wishes to advance his relation & not having the money at command conveys him a piece of land to be defeated on payment of the sum he wishes to advance & the

Mortgages

M-gor dies without redeeming the land is then irredeemable - or Suppose there had been a precedent debt & the m-gor made this condition that "if he had no issue male, then the land to be irredeemable" In both these instances the right of redemption is defeated on the ground of its being a family provision - 2 Vent 301 Hard. 511

It has been a question "Whether a parol agreement could be annexed to a deed & make the conveyance a m-ge but it is determined that it cannot for this would be varying the estate from a fee simple absolute to a fee simple conditional & the salutary maxim violated "That no parol agreement shall be let in to vary the operation of a writing" The m-gor, however, may appeal to the m-gee's conscience. If he acknowledges the parol agreement the Ct will decree it a m-ge. This being consid^d as good as written ~~indivisible~~ - as no man could be supposed to take a false oath against his own interest - And if the m-gee had promised to execute a defeasance & there is evidence of this Chancery will compell him to execute it - 3 Atk. 389. 3 Wood. 430 P. Car. 526

If the parties have so treated the conveyance that it is manifest they consid^d it a m-ge Equity will consider it so likewise -

Where a conveyance has been made to

defraud creditors, Courts to discountenance
such transactions, will not suffer it to be
redeemed —

A. M-gee may eject the Lessee of the m-gor
if the lease was granted after the mortgage
Doug. 21. 2 Bro. 550 11 Coke Rep. 51 - Car. 304 —

Every person who has any interest in the es-
tate may redeem, as heirs, devisees, creditors &c
except, as we shall hereafter see, the wife

A Lessee of M-gor may redeem

The m-gee may treat the tenants of
the m-gor as his own by taking the profits from
them &c Doug. 205. 3 M. 723 —

The m-gor must not commit waste if
he does Chancery will grant an injunction
against him Doug. 670 —

Lecture 10th June 11th 1794

There is a practice in the United States
of selling real property at Public Vendue to
pay taxes. This may be redeemed within
a year & then the generally received opinion is
that it is irredeemable — This a Stat. provision —
Here we have a Stat. explanatory of the for-
mer Stat. by which Creditors are authorized
to redeem after the year has elapsed — Some doubts
have been raised from the words of the Stat
which says that unless the debtor redeems
within the year limited, an absolute fee sim-
ple is vested in the Purchaser. Mr Reece sup

poses that this term expresses the same as the same technical term does in other mortgages, & ^{as} ~~that~~ the Legislature must be supposed to be acquainted with the technical terms, when they make use of them they must be taken in the same sense as they are in Courts - It is his opinion therefore that these conveyances were always mortgages - the last mentioned Stat. plainly shews that the Legislature had also consid^d the debtor as having an Equity of redemption - The substance of this Stat. is "That if the debtor does not redeem within the year, after that his creditors may redeem & shall hold the ~~same~~ ^{land} as a mortgage liable to be redeemed by the debtor - It is easy to see, therefore, that this is a Mortgage, if not in the strictest sense, yet in effect - for the debtor if he had no creditor might make one & suffer him to redeem - then redeem out of the creditor's hand.

From this it appears that the ~~Legislature~~ ^{Legislature} meant not to deprive the debtor of his Equity of Redemption, but only to limit a time after which it should be consid^d a neglect in ~~the~~ him not to redeem & that a petition in Chancery by a creditor might be preferred to one by the m^{or} - (No decision yet on this subject) -

Mortgage

Another exception to the Maxim "Once a mortgage & always a mortgage" - If the mortgagee brings an attachment on the land he abandons it as a security & it ceases to be a mortgage -

The money laid out by the mortgagee for improvements is to be allowed him with interest 3 Atk 513.

The mortgagee must not commit waste. At Law there is no restraint to his committing waste - but Chancery will grant an injunction - Chancery will value the waste & consider ~~the~~ it as rents & profits to sink the debt 3 Atk 723.

If the heir will not redeem Creditors may

In case of a gratuitous conveyance if the grantor owes - ~~there has~~ It has been a question who had the best right, the Creditor or the Donee. There is no doubt as to ~~the~~ between the Grantor and donee - But creditors have a higher right than donee - on the solid principle that a man ought to be just before he is generous.

The wife has no power to redeem her husband's land - But she may be endowed ^{in mortgaged lands} if she will pay $\frac{1}{3}$ of the interest of the debt 1 Atk. 603 - 2 Vern 304 - A poor man devise an equity of redemption & it will pass under the name of "land" see page 277.

If the estate mortgaged is sufficient to pay off all the debts a 2nd mortgagee has every benefit

of the m-ge that the 1st has except the legal title. The moment the 1st M-ge's title is defeated it vests in the 2nd & the same benefit extends to all ~~future~~ succeeding M-gees — 7 Viners 52 —

If an equity of redemption is devised to one for life & another in remainder. The devisee for life may redeem & his heirs may hold the estate till the remainder man will pay two thirds of the mortgage money & if the remainder man redeems the devisee for life must pay one third or he cannot take possession. a life estate being considered ~~as one third as good as one third of an estate in fee~~ one third as good as one third in fee simple — Altho a Court of Law considers the equity of redemption as nothing, yet Chancery will order it to be sold to pay debts if the heir will not redeem — 3 P. W. 341 — 2 P. W. 412 — 2 Atk. 50 —

A Court of Chancery takes away no rights of persons having a lien upon ^{the} land by making it Equitable assets — Here the Equity of Redemption is inventoried & treated as other Person's property.

Lecture 11 — June 12 — 94 —

An officer may attach an Equity of Redemption as real property altho in the hands of the M-gee. This don't affect the rights the m-gee but takes away those of the m-for —

~~The Mgor~~ After the land is attached it is appraised & the Creditor puts himself in the place of the mgor - The mgor cannot redeem unless he pays all debts due from him to mgee ^{whether the sum stipulated} prior or subsequent to the date of the mge - This is to be understood as between the mgor & his representative & the mgee & his representative - It was formerly the law that the mortgagee need only pay the money stipulated, but it is now settled to the contrary - When a 2^d mgee claims, the first can redeem by paying the sum stipulated in the first mge, ^{2d Atk. 52} ~~that the 2nd mgee may~~
1. Ves. R. 7. Atk. 556.

Before a Ct of Equity will aid a mgor they will oblige him to do complete justice in ^{or as bond with penalty, the mgor shall pay interest to} fore Science - It is a principle established in the Books that if the Mgee ^{fraudulently} conceals any debt contracted by the Mgor antecedent or subsequent to the Mortgage, a Creditor may ~~redeem~~ by paying only the sum stipulated - From this it is natural to conclude that he could not if there had been no concealment, without paying the other debts - But this is not the case - ^{see 1st Hall 105}
Courts have made this exception that the Creditor may redeem by paying debts contracted antecedent, without paying those subsequent to the mortgage -

Mortgages

275-

If the m-gee sells his mortgage under value & the m-gor wishes to redeem by paying this smaller sum^{the} Court will not suffer him to do so for if the Purchaser has made a bargain it is his and the m-gor's - 1 Halk. 105 - Rec. C. 511 - Yet if the ~~pur~~^{cred} purchaser for less, the Creditor may redeem by paying that sum only - Rec. C. 89.

2 Str. 1107 - As to Stat. of Limitations runs on an equity of redempⁿ - nor does length of time of itself bar the Equity - But length of time connected with other circumstances will destroy it.

Wherever the m-gor continues in possession no length of time operates to destroy the Equity nor if the m-gor has received interest within 20 years - To make length of time equal to a Stat. of Limitations, the m-gee, after the Lease day or forfeiture, must have remained in possession 20 years & nothing must have been done by the m-gee alone, or by him & the m-gor together to show that they consid^d it a m-ge 3 Mm 288 -

3 Atk. 313 - When this limiting time has begun to run and afterwards some disability intervenes the time runs on notwithstanding 2 Atk. 333 -

There are a kind of M-ges called Welsh mortgages which are liable to be redeemed at any time to end of the world - There are conditioned to be

Mortgages

that if the money be paid on the 1st of June or on the 1st of any succeeding June to the end of the world, then the mortgage to be defeated.

The M-gee may bring a bill in Equity to foreclose the Equity of redemption —

If the m-gor applies to redeem, he must pay all the debts due from him to the M-gee; but if the m-gee bring his Bill for the m-gor to redeem or be foreclosed the m-gor need only pay the sum stipulated in the mortgage.

If the m-gee sells a m-ge foreclosed & it falls short of the debts he will endorse it on the bond & if it overgoes he must account for it in Equity.

When a foreclosure is once effected it operates to pay the debt. That is so that the m-gee cannot bring any after suit for the debt —

Lecture 12th June 1834 —

Originally Courts of Equity entertained the same ideas as Courts of Law respecting lands descending to the heir. They supposed the beneficial interest as well as the legal descended to him. — But now upon the death of the m-ge the nominal ^{interest} legal title vests in him & the beneficial interest in the Ex^r. — In case of a trespass upon the land the heir must bring the action. & if damages are recovered they go to Ex^r.

~~If the Mgee wishes to convey the~~ heir is com-
^{to the Exr or pay the mortgage money}
 pellable in Chancery to give a title. A mortgage
 in a mgee is personal property see 2 Vern 621
 "Lands, tenements & heredit" as a general rule will
 not pass m-ges - The term "personal propy" will.
 If however it is plain that the testator's intention
 was to pass m-ges under the term "Lands &c"
 Courts will suffer that to rule. Any expressions
 clearly indicative of his intent to pass a m-ge
 will answer the purpose 2 Bur 978. If the
 Mgee in his will orders the m-ge money to be
 delivered to "the heir or Exr" it may be paid
 to either & if to the heir he is trustee for the
 Exr. 2 Vent 348. Hard. 467.
~~If the mgee's heir chooses to pay the~~
~~m-ge money he takes the land & the money goes to~~
~~the mgee's Exr being personal property.~~

As the mgee takes the land in security
 for a debt as to him & his heir it is personal property.
 But when assigned by him, the assignee takes it
 not in security for a debt but as real property.
 It therefore will go to his heir & not to his Exr.
 In case of a devise the mgee may consider it
 personal or real & Courts will consider personal or real
 according to his intention to pass it to the heir
 or exor. If a m-ge is created by words of joint-
 tenancy &c will not gratify the parties by suffering
 a right of survivorship. But it is a tenancy in com.
 Query 258.

It may be an important question in this country "whether the Ex^r might not bring the action to foreclose instead of the heir?"

Why should the heir be obliged to bring an action & subject himself to a trial of costs, where he can derive no possible benefit? It is certainly an idle business — After the heir has foreclosed if he will pay the mortgage money to the Ex^r he may hold the land in spite of every body —

Foreclosure

It frequently happens that the mortgagee wishes to make a family provision, or want money to set out in trade &c. They wish therefore to have either the mortgage money, or the land given in security. By petitioning to Chancery they may have the mortgage right foreclosed. The Ct will fix a certain time for the mortgagee to redeem & if he fails ~~there~~ that his right shall be forever barred. 2 Ves. 385 —

There have been attempts to foreclose before the forfeiture — Cts however will not suffer this in any case —

The mortgagee shall not impeach the title he has given to the mortgagee on the ground. That no man shall impeach an instrument to which he has given money which is an estate in fee simple —

Other persons interested may impeach the mgee's title. 2 Atk. 344.

A mgee may pursue all his remedies at one time - foreclose, attach &c. 2 Atk. 344. If the m. or is dead the Bill must be bro't against his heir. Or if it is requested the Ex^r must be joined with him - 3 term 393. When Chancery fixes a ~~number~~ time for redemption or foreclosure the mean Calendar months. The mgee may prefer a foreclosure against ~~all~~ not only the mgor. but all the incumbrances at the same time. if he brings it against the mgor only & alone is foreclosed. Infants may be foreclosed. But they are ~~at lib~~ ~~erty to sue~~ have the allowed 6 months after after they come of age to enquire into the affair before a Ct of Chancery, & if there has been any unfairness or any fault in the Guardian &c. the Court will open the foreclosure. ^{3 B. Rep. 6. 301.} 504. 352

Notwithstanding what may be said about a foreclosure; it has rarely the effect to make the mortgage irredeemable. There are numerous circumstances, with one of which if the case is attended, the Ct. will open the foreclosure & make it redeemable. The foreclosure will be opened if there was any fraud made use of to obtain it. Our Courts have established an Equitable Princi-

Mortgages

ple variant from the English - They will not foreclose if there appears to be any great disparity between the mortgage money & the estate mortgaged - English Courts will foreclose where there is a disparity & altho they are sensible they shall open it again - Our Courts consider this an unnecessary & idle farce -

Lecture 13th June 14 1794

A Decree of foreclosure may pass against him Courts, & no time is given when they may enquire into the cause of the foreclosure before Chancery. They shall not suffer from the negligence or coercion of their husband 2nd 230-3rd 238 - No length of time shall operate to prevent her from calling in question the title -

Where there are other Creditors besides the mortgagee the foreclosure will be opened on any unfair conduct of the mortgagee to defraud other Creditors & mortgagees will furnish a ground for opening -

There is a case in Barnardiston 221 where the foreclosure was opened on account of disproportion between the debt & the worth of the land -

There is no opening for a volunteer as a donee & devisee -

But a Welsh mortgage cannot be foreclosed see 406 -

In Salk. 276 see the principle of a m-gee's waiving his foreclosure &c

The Rule of the debt being satisfied when there is a foreclosure, would give but an inadequate idea of the Subject - for the m-gee may bring his action at any time on the bond but by this he waives the foreclosure - If the m-ge was sufficient for the debt, the m-jor may bar a recovery in a suit on the bond - for the m-gee has received enough to satisfy him & it is unreasonable in him to demand more - But if the security was insufficient the m-jor cannot take this advantage -

The m-gee may have his choice either to take the slow method of recovering his debt out of the rents & profits, or file a Bill to have the security sold & in this case the m-jor takes the surplus - or he may obtain a foreclosure & sell the land himself - But if there are other Creditors & mortgagees, & a sale will prejudice them Chancery will not decree a sale - And when they decree a sale no more is sold than is sufficient to pay the m-gee -

In 1 B. 21. C. 414 there is a case where there was great disproportion & a parol agreement that the m-jor might redeem - but 20 years the m-gee had been in possession & Chancery would not suffer a redemption -

In 2 B. Par L.^{III} a case when the court would not open as the mgee had entered & had remained ⁱⁿ ~~all~~ ^{the} while undisturbed & had ^{out} ~~laid~~ ^{paid} great expense on the farm -

If the mgee has unfairly concealed his incumbrance, & in consequence ^{of this} another has taken a mge, the 1st Mgee's claim will be postponed to the 2^d - see 2 Atk 49. 1 Pth 39. or 139. There is a case contradictory to these in 1 Wm 6 - Honest negligence in the mgee will furnish a ground for postponement 1 Wm. 357.

If the mgee does not obtain the title deeds, he must suffer the consequence - As if the mgor should shew his title deeds, ^{& mortgage again} & on the strength of this borrow money the 2nd mgee shall stand in the place of the first -

In 3 Pth 280. 1 Wm 300 these are instances when the mgee denied that he had a mge & yet was not postponed - The mgee supposed it an inquisitive question which the inquirer had no business to ask - But if he had told the mgee that he was about to take a mge provided he had not one, the 1st mgee would have been postponed - In this state we have no such regulation of postponing as we have Records & those who take succeeding mges must be deceived if they will examine them

But where deeds are not recorded the same reason holds here so that we ought not to be ignorant of the Eng. Law —

Where there are several mortgages who has the legal estate has the prior right. A 3^d mortgagee may purchase the 1st Mortgagee's title & protect himself against the 2^d. See 2 Vesey 573 2 Vent. 337. 1 Stra. 240. Hard. 318.

It makes no odd whether the puisne incumbrancer had paid for the legal title or not if he has it he can take advantage. The Ct. have even gone so far as to give the preference who has obtained the legal title by fraud — yet if he knew of the 2^d incumbrance when he purchased the legal title, he shall not protect himself. 3 Atk. 238. And he is not benefitted if the title is defective. 1 P. W. 340. The principle of a puisne incumbrancer obtaining the legal title & protecting himself against an intermediate incumbrancer is ~~not warranted~~ a violation of private right not warranted by reason or justice.

Lecture 18 June 10 — 94

If the 1st mortgagee has ^{also} a lien upon the land by judgment, as by Stat. Merchant Stat. Stap. or Recept., he may tack this to his mortgage & protect himself against all other incumbrancers, unless he knew

Mortgages

If he had no notice of these, the 2^d m^gee cannot redeem without paying both debts —

To give the 1st m^gee this advantage the debt must have been contracted & the judgment obtained by himself, not purchased —

If a 1st m^gee is defective which would be made good in Chancery, the 2^d m^gee shall have the preference altho he knew of this defect For he has the legal & equitable titles & these together are superior to the equitable alone — 1 Str. 240 — Tho' the first m^gee's title is defective he shall be preferred to all creditors 2 Wm 491 good 2 Salk 449. 3 Bac. 644. Some men, Merch^ts in particular frequently provide that the land m^gee shall be a security for all subsequent debts to be contracted between them. In those instances as between the m^gor & m^gee the terms of the contract shall be literally complied with the m^gor cannot redeem without paying all debts —

The only advantage that such a m^gee has is that when he comes to foreclose the m^gor must pay all the debts while in Common mortgages, he need only pay the m^gee money. But other m^gees not knowing the terms of the 1st m^gee shall not be affected by such a m^gee — yet if before they took m^ges, they

Knew the terms of the 1st m^ge, it was their own folly, & the 1st m^gee shall have all his debts before they can claim. See Triner 52

If a m^ge is given to one as trustee, a 3^d m^gee shall not protect himself against a 2^d by purchasing the trustee's title. Salk 680. 3rd W 360 1st W 475

It is common for m^gees to join a petition for a sale of the m^ged premises. When this is done the money is distributed according to priority. If there is only enough to pay the 1st m^gee he takes all &c. In such case a 3^d m^gee shall not avail himself of having purchased in the first incumbrance 2^d Ver 571-
or 1st W 809- Triner 320

If the principle is just that a genuine incumbrancer should protect himself against an intermediate one by purchasing the 1st incumbrance, what need of these exceptions? It is manifest from the 6th squeezing these cases out of the rule that they are impressed with the injustice & unreasonable-ness of it.

Where a foreclosure has been obtained & it can be proved that the m^gor previous to the foreclosure had tendered the money to the m^gee the equity of redemption will revive —

A m^ge is obtained & after that the m^gor becomes

Mortgages

a Bankrupt I must per the same Land a
gain - altho the I must per did not know
of the Bankruptcy. He cannot protect
himself by purchasing the 1st mortgage
for the major's estate on his Bankruptcy
vested immediately in the Commissioners, to
pay debts contracted previous to the 2^d mortgage.

It will not avail a man to plead ignorance that there was a deed, where there are Records kept & he might have seen it by searching - The Law implies that he had notice. This is called ~~called~~ constructive notice to

notice. If a record was mislaid or lost thro the
carelessness of the Register he shall be lia-
ble for damages that happen to be sustained in
consequence of it—
immediately
1803 & a noth

consequence of it —
A Deed is taken & not recorded ^{immediately} & another
Deed is given of the same land & recorded
first, the 2^d grantee shall have the preference
over, if he was a bona fide purchaser, not
knowing of the first deed — 1 Vern 64 —

But if there had been no negligence on the part of the 1st grantee he shall have the preference as if he is at a distance from the Record & means to go & have the deed recorded in a few days when shall he going ~~his way~~

Lecture 15 — June 17. 54 — 287

Where there are several m-gees & a subsequent one brings an ejectment, he will eject the m-ge, or unless the prior m-gee interferes to prevent it. The m-ge has no right to say that he has no title - for as to the m-ge, a subsequent m-gee has a complete title. If a prior m-gee prevents a subsequent one from entering, as he may by ejecting ~~him from the m-ge~~, ~~he must~~ the m-ge himself in such case as between him & a subsequent m-gee, he must account for the rents & profits - as if ~~at~~ the m-gee ejects B. m-ge, & suffers ~~the~~ him to take the rents - upon a Bill by B. to redeem A. has not to account for the rents - but if B. a subsequent m-gee bring his Bill against A. he must account for the Rents & profits - Re B 30 - 3 Bac. 658.

If therefore the prior m-gee has suffered the m-ge to remain in possession or to take the profits against the will of the subsequent m-gee he must himself account for profits &c.

Now can the m-gee ~~use his m-ge~~ ^{as} to use his m-ge ^{as} to injure the m-ge. A m-ge to B. A remains in possession & leases to C as he may for 3 years. If C does not go out at the end of this term A. may eject him it does not lie in the mouth of C. to say that A. has no title. In this case B. brings

Mortgages

brings an ejectment against C as he may prevent. A for C is not liable after judgment in favor of B to be ejected by A. B having obtained judgment suffers C to remain in possession paying nothing. B shall account to A the m^{or} for the Rents & profits —

A m^{or} to B remains in possession. B sells to C. A brings his Bill to redeem against C. & pays to him the m^{or} money. But B had entered & received profits before he assigned & C then entered & rec'd profits. Suppose the m^{or} was for 100£ Principal & interest when A bro't his Bill the profits rec'd by B were 30£ the profits C had rec'd was 30£ A then owes but 40£ yet C is to account only for what he rec'd & B is to be made a party to the Bill that he may be made to account for what he rec'd. If the decree will be found according to the circumstances of the case so that A the m^{or} cannot lose anything. A subsequent m^{or} comes to redeem. The account as stated by m^{or} & g^{ee} binds him unless there is collusion 3 Bai. 659. The mode of accounting where the profits exceed the interest. Suppose the interest 9£ & the profits 20£ here is a surplus of 11£ the

Principal to produce 9^l interest must be 150^l
 Apply annually the surplus to sink the
 principal - for the 2^d year it leaves only 139^l
 on interest & so on 2^d Atk. 534 -

The m^r or dies - the Equity descends to
 his heir & the Personal Estate to the Ex^r. The heir
 wishes to redeem, he shall have aid of the Assets
 in the Ex^r's hands to redeem the Land. The enquiry
 is what fund ~~is to be~~ ^{was} benefitted by the m^r -
 & from what fund take the money to redeem
 2 Salk 449. 6 B.P.C. 520. 3 D^r 14 - Hard. 512 -

The Devisee ^{of Real Prop^y} may take the like advantage
 of redeeming by the Personal Assets - 1 Atk. 487
 & where Land is devised for payment of debts
 the legal construction is that this is to be done
 only upon deficiency of Personal Assets. 2 Vent 349.
 3 B.P.C. 290. But a man may exempt by express
 words his personal prop^y. 1 Ves. 51 -

The rule that the heir may have the
 benefit of the Personal Estate to discharge the
 Debt does not obtain against Creditors or gen
 eral Legatees for they must be paid before
 any aid is given to the heir - when they are
 paid what remains may aid the heir in prefer
 ence to the Residuary Legatee -

Lecture 16th June 18 1794

The purchaser of an Equity of Redemption dies -
 & thus his heir have a right of person's estate to redeem &
 so - for in this case the person's fund was not time
 fixed, the purchaser when he bought the Equity in
 ten years to make an addition to his real estate
 In the other case the m-gor had bettered his per-
 son's estate as much as the debt ~~was worth~~ ~~he~~
 he owed the m-gee, & in this account the m-ge was
 redeemed out of that fund - but the heir of the pur-
 chaser must redeem with his own money - 10r. Can. 101.

It has been a great question whether the wife of
 a m-gor might be endowed in his Equity of re-
 demption - This distinction runs thro the cases - where
 the m-gor still retains the fee having m-ged only
 for a term of years she is entitled to dower - but
 where the m-ge is in fee she is not - 1 Atk. 606.
 2 Atk. 526 - Pre-Can. 137. The first cases in which this
 principle was established were those where the land
 was m-ged before coverture & the wife not endowed
 on the ground of the husband not ^{having been} seized du-
 ring coverture - This circumstance was not attended
 to when other cases came up where the land was
 m-ged after coverture & thus a set of precedents
 came to be established without even a legal reason to
 support them -

The wife of a m-gee is not entitled to
 power of being person proper. -

The husband by m-ging the wife's land
 places his interest therein but cannot bind her
 or her heir. Yet a m-ge by the husband & wife may
 be confirmed by the act of the wife after cover-
 ture is ended Doug. 33 Comp. 201 20th 127 2 very 526

When the wife's estate is m-ged by fine if
 the husband dies she is entitled by ^{his} person's assets to
 redeem her land 10th 11m Case vs Austin -

If the husband & wife mortgage her land & subsequently
 for his debts, the wife after his death take his
 personal property to redeem.

When the husband's estate is under a m-ge
 & the wife joins with him & m-ges her own
 estate to answer for his upon his death she
 shall stand in the place of the m-gee ~~the free~~
^{with respect to husband so disencumbered}
 and hold the land till redeemed by the Exor or Exors
~~liable to all creditors 2 Atk. 384 -~~ ^{= trust.}

When the husband dies, his wife's choses in action
 goes to her as a general rule, but if the husband
 before marriage had made a settlement upon his
 wife which Chancery shall judge competent, this
 will be considered a purchase of her choses in action
 & her other estate ^{& her other estate}
 & on his death they go to the Exr. - So where the
 wife is m-gee, & the m-ge is not redeemed during
 coverture, the m-ge is held unless the husband has
 released her estate by a competent settlement.

A settlement after marriage is not in pursuance of marriage articles but voluntary will have no such effect 2 Atk. 444.

As the wife's mortgage is her own estate the husband may reduce it to his possession & if then goes to his Crs. an alienation. In a valuable consideration is reducing to his possession; & if the husband's creditors have got hold of the wife's mortgage they will hold it 10 Pp. 338. 3 Pp. 167. But had such mortgage been secured to the wife by articles before marriage it would have secured it from creditors 2 Pp. 916.

A Court of Equity would not ever permit a mortgage of the wife to pay the mortgage money unless the husband would make a suitable settlement on the wife 10 Pp. 382. Yet it would aid the particular assignee in valuable consideration.

Interest

It is a rule in Chancery that if the condition in a mortgage carries more than legal interest, the Chancellor will not say that the deed is void but will only excharge the illegal interest. Where the contract is for a certain interest below what is legal at 4 P Cent & a proviso that if that interest is not paid by the time it shall carry 5 P Cent Chancery will

consider this a penalty & relief against it -
 But if the contract is to receive legal interest & it
 paid at such a time an abatement is to be made
 if the m^r gov is punctual, the abatement will be
 made, tho it not paid at the time then shall
 be no abatement 3 Ark. 520 - 3 Bur. 1374 -

Where the m^r gov sells the m^r se with the m^r gov's
 consent & the purchaser pays the m^r gov prin-
 cipal & interest the whole now becomes prin-
 cipal in the hands of the assignee & carries in-
 terest - But this assignment must be by the consent
 of the m^r gov to have the assignee take this advantage
 3 Ark. 271 - Where the m^r gov consents & the profits
 fall short of the interest yet this surplus of
 interest does not carry interest -

If the m^r gov or m^r gov file a Bill to have
 the account liquidated & the Master of the Rolls
 makes a report, it is all consid^d principal &
 carries interest - 10 P^rin ARK - But where there
 are creditors or subsequent m^r gov's, whose interest
 is affected by this compound interest the rule is
 dispensed with - 3 Ark. 722 - It is likewise dispensed
 with when infants are concerned, unless they cause
 the liquidation themselves 2 P^rin 25 2 B.P.C. 56
 1 B.P.C. 447 - 12 Vinier - 113 After the account has
 been made by gov & gov, the mere signing of the m^r gov does
 not make the interest principal & so to draw interest -

Mortgages

Lecture 17 - June 19th 94

Contrary to what Mr. Keen said down in the last Lecture Warden says the wife can take none of land in Equity of ^{in all cases} redemption except when the land was mortgaged before marriage - The husband cannot be tenant in entirety of lands held by the wife as mortgagee of Interest

Miscellaneous Principles

An agreement entered into at the time of the mortgage that the interest that shall accrue shall be made principal & draw interest if not paid annually is a valid agreement & shall be void Salk 149 - This Rule in Chancery is conformable to the rule of Law in such case - But an agreement afterwards that the interest that has already accrued shall be principal is good at Law and Equity & it will draw interest - 2 Atk. 331 - So also in the case of a Book account if the debtor agrees to pay interest & gives his obligation for it it is a valid agreement 2 Atk. 331 - If the title of the mortgage is attached the mortgagee is not obliged to defend it, but he may if he does it shall be added to the principal & draw interest - 3 Atk. 518 -

When land is mortgaged & there is a tenant for life of the Equity of redemption in possession, the remainder man can compel him ~~to go~~ in Chancery to keep the interest down, or the remainder man may redeem & the tenant must pay him one third of the Redemption money, or quit the possession. Feud. in tail is not compellable by Remainderman to keep down the interest. ⁴⁴⁷ 1 Ves. 447.

The operation of a tender after forfeiture is, ~~that~~ when the sum can be ascertained, is to prevent any further interest accruing, tho it does not revert the title ~~if~~ ^{notice must be} given when the tender is to be made. Lit. be made accordingly.

The rate of interest originally reserved upon a mortgage may be altered by a parol agreement when the agreement is not to enlarge, but diminish it. 3 B. & P. 580 - This must be founded upon a principle operative in the English law. That a man may waive his right, & if evidence can be produced that he waived his right by an agreement, it will be binding upon him, who waived his

Provisions by the Stat. of New York

They have a provision for the sale of the Estate of absconded mortgors, to pay in fees the mortgage money. The land is to be sold & the Sheriff

must execute the deed of sale. The Surplus is to be put into the use of Chancery to be paid to the m^{or} on his return.

Seven years are allowed the m^{or} to call the m^{ee} to account, & when he has received too much to refund.

M^{ges} are by this that to be registered & acknowledged or proved before a magistrate by the subscribing witness. When there is a feigned defeasance that is also to be registered. The first registered of two m^{ges} to prevail if bona fide made.

They have recognized the power of the m^{or} to authorize m^{ees} to make sale of the m^{ge} & in such case no equity of redemption remains but a right to the surplus, ~~does~~ not extend to affect the right of redemption in a subsequent m^{ee} or other incumbrancer. This power to sell is to be recorded, and not valid when executed by any person under 25 years of age. The sale must also be at Public vendue.

Of Estates upon Conditions

297

There are such estates whose existence depends upon the happening or not happening of some uncertain event, by which the estate may be created, enlarged or defeated.

There are not a distinct species of estates but qualifications of others, as a fee simple, fee tail for life for years &c may depend upon these conditions - These conditions are called Precedent or Subsequent according as they are to commence or be defeated. An estate to commence on the happening of an event uncertain, is on a precedent condition one to be defeated on a contingency is a Subsequent condition.

Where the condition is Subsequent the Estate commences immediately. ~~but where it is~~
~~immediate~~ but where it is precedent it never commences till the event happens.

In the former case if the thing ^{to be} done which defeats the estate is unlawful the estate is completely vested the condition being consid^d void.

In the latter case of a precedent condition, if it be to do an unlawful act, the estate cannot commence till the performance of the condition & if it be to do an unlawful act it cannot act on the performance of the condition. For no man

Of Estates on Condition

shall acquire property by violating the Laws of the Land

No Estate of Freehold can commence on a precedent condition unless a prior freehold is given in presenti—

If A grants an estate to B. to be defeated upon the happening of an event & the event happens the grantee will continue to hold the ~~land~~ estate untill the grantor or his heirs enter a claim for a breach of the condition, but if it had been limited over to a 3^d person, the grantee's estate expires with entry—

Of Estates by Stat. Merchant, Stat. Staple & Elegit—

These are Chattels & go to the Ex^r For the mode of acquiring & then & what they are see page — & Black. 2. vol.

The form of the action to recover is the same as if it was real estate—

Of Estates as it respects the number of owners in Severally, Coparcenary, Jointenancy, Tenancy in Common—

An Estate in Severally is where one owns an estate by himself independent of every other person This may be created by the destruction of jointenancy or coparcenary or tenancy in common by partition—

This is where several own an estate that de-
 scended ^{to them} from some ancestor. All of them are
 in law but one heir; of course if an action is
 to bro't against the heir as such, it must be against
 all the parceners. an action by them also must
 be in the name of all Co. tit. 164. The entry of
 one parcener is the entry of all, & the one who
 enters cannot avail himself of the Stat. of Lim-
 itations unless there has been an actual ouster.
 Sometimes a receipt of the profits may be
 under such circumstances as to amount to an
 actual ouster. but the mere receipt of the profits
 is not of itself sufficient - it must be a receipt claim-
 ing them as his own. Holding up an adverse
 possession may amount to an ^{actual ouster} ~~adverse possession~~.
 Where there has been an ouster the other parcener
 may bring an ejectment the nature of which is not
 to turn out the other parcener, but to let in him
 that is ousted.
 Lecture 18. th Partition may be made by agreement
 or in comb. case in a Court.

It is not an uncommon practice in Eng
 & Con. to make partition by private agreement. But
 this is not warranted by the Stat. of Frauds & is
 the practice is for one to divide & the other
 choose - If the partition is in writ the Com. Law

Of Parcenary estates

mode is for one to bring the action stating all the circumstances of the case & as they could not agree to the Court must establish the title of both & the Court order ^{the Sheriff to take} 12 men to make partition & then division is bro't before a Court where objections may be made, not to the justice of the division but to the conduct of the Sheriff or jury.

In Com. the Sheriff takes 3 men who not directed by the Stat to seize the estate & divide it he makes a return of this transaction to the Court Clerk & it is conclusive.

No action of trespass or Waste lies between parceners but if one goes into possession & takes more than his share of the profits the other may maintain an action of account against him - There is no right of survivorship among them. If one parcener dies his estate is destroyed, & the other parceners & the heirs ^{of the one who died} are tenants in Common.

Where the estate is one thing that can't be divided ^{are in fee} in Eng. the eldest daughter has a right to pass the shares to the rest & take the whole - but the most common way in Eng & Com is to enjoy by turns &c.

This estate is always acquired by purchase when an estate is given to 2 or more persons without any words explanatory of the grantor's intention. That is, there be some other estate, the presumption is that it is a jointenancy. — This estate may be for life, years, or in fee &c. Both tenants must have the same quantity & interest; it must commence at the same time, & be created by the same title. — Jointenants have no action of trespass, but they have of waste. Formerly they could not compel partition, but now they may ^{by Statute}. The entry of one is of both & the possession of one the possession of both. In Eng^d the survivor takes the whole — here there is no jus accrescendi or right of survivorship. This was abolished by our Courts without the interference of ~~the~~ Stat^{ute}. — If an estate is here created which in Eng^d would be a jointenancy, it is a tenancy in Common. — In N.Y. every such estate will be a tenancy in common if not expressed to the contrary by Stat^{ute}.

Of a Tenancy in Common

Every other mode of holding lands together besides what we have seen is a tenancy in Common — as if one holds by purchase & the other by descent — one in fee & another in tail &c.

Of Tenancy in Common

one by purchase from one person & the other by purchase from another - Never a jointtenancy or Coparcenary any way only let the unity of possession remain & then are tenants in common.

This estate may also be created by particular limitation in a deed as "a moiety to one & a moiety to another" - "jointly & severally" - or "equally to be divided" - They are compellable by Stat. to make partition - liable to waste & account by Stat. to trespass &c. — Lecture 19th June 21st 97
(Of a Reversion)

Whenever an estate less than a fee simple is created there is a reversion in the grantor. As if a man grant an estate for years, or for life, he has the reversion. This reversion is an estate descendible, derivable & in the hands of the heir, & affects except in case of entailed estates, it is then of no value. The reversion is the residue of what was not granted with & returns to the grantor by operation of law. It ~~is~~ does ^{not} affect the heir as to payment of debt till he can obtain the reversion & remainder.

A remainder is where a less estate is given & that residue which would return to the

grantor, or part of that residue is at the time of the grant of the particular estate, granted over. As if A grant an estate to B for years, remainder over to C in fee simple. This is a grant of the whole residue - had it been to B for years, remainder to C for life, there was a grant of a part of the Residue only, & the other part of the residue is in the grantor - or had it been remainder to E for life, remainder to F in tail remainder to G in fee simple then the whole residue which would have been a reversionary estate in the grantor is parted with.

A grant for years remainder in fee, is not making an estate in feehold to commence in future for the remainder granted vests the freehold instantaneously, tho' the enjoyment is postponed. To make a good remainder, there must first be created an estate less than fee simple. This is obvious from the term itself - Suppose an estate to A for 20 years remainder to B in fee simple - good - but an estate to B in fee simple to commence 20 years hence without an intervening estate is good for nothing. Freehold estates cannot pass in this way. But estates less than freehold may pass - as an estate for years to commence 20 years hence. An estate at will is not such an estate as that a freehold

Remainder Contingent

can be limited upon it— If the particular estate is void ⁱⁿ its creation or before as by forfeiture or surrender, the remainder is lost— The remainder must be created at the time the particular estate is given— the remainder must vest in the grantee during the existence of the particular estate, or eo instante that it determines— An Estate is given to A for years remainder to B in fee simple, the remainder vests by the grant, it is an interest in B descendible, devisable, &c. to the person who is to take by the grant is immediately vested— But where it depends upon some contingency that may or may not happen it is a

Contingent Remainder

When this contingency happens ^{the estate} ~~it~~ becomes vested. Ex. emp. An estate to A for life, remainder in fee to B's eldest son when born— At the time of the grant B has no son & consequently there is no person in whom it can vest & it is uncertain whether it ever will— But the moment B's son is born it vests provided it is alive— if it is dead altho B afterwards has a son, it cannot vest for the particular estate is determined before there was an estate in

The remainder to vest. To make these remainders good the event upon which they depend must be not only possible but what Lawyers call a common possibility not a remote possibility. As an Estate to A for life remainder in fee to the heirs of B who then is alive. This is good for it is a common possibility that B being alive will have heirs. But suppose it had been limited to A for life remainder to the heir of B's oldest son B then having no son. Tho it is among the possibilities that B will have a son & his son also have a son, yet it is so remote a possibility that the Law will not suffer such limitations.

To make a contingent remainder it is not necessary that the reason be uncertain but the time be fixed & the event upon which he is to take be uncertain. As an estate to A for life remainder in fee to B if he survives A. If it is asked 1st when is the fee in such case the answer is in B. for it passes by the grant 2^d where the fee is when an estate is granted to A for life remainder to B's oldest son who is not born the answer must be either that the fee is in A before it wants to vest, or if this is a son

ridle thing, it is in the grantor to be directed
 in the birth of B's son - 3rd An estate to A
 for years remainder to B's eldest son not
 as n, this is not a good contingent remain-
 der, for to make it good it cannot be
 limited upon an estate less than a freehold
 for the freehold, if the fee does not, must
 pass out of the grantor at the time of the
 grant - These contingent remainders are dis-
 charged whenever the particular estate happens
 to end before their time of vesting - as if the
 tenant for life should forfeit his estate or surren-
 der it - To give effect to the grant therefore
 a method has been introduced of granting to
 A for life remainder to B, ^{or heirs} as trustee (to pre-
 serve the contingent remainder) & remainder
 in fee to the heir of C -

The Law as it respects wills in this
 respect is very different - The Maxim of an es-
 tate ^{in freehold} commencing in fut &c is totally disregarded
 A devise of a freehold to commence on some
 contingency at a future period is good tho
 no particular estate is given - As a devise to
 A on the day of her marriage & as to what

Becomes of the freehold in the interim, it is in the Reversion of the deviser. A Remainder by devise may be limited to take place after a devise in fee simple upon the happening of some contingency which cannot be done by deed. As a grant to A. & his heirs forever & if he die before he comes of age, then to B. & his heirs &c. To make the executory devise good the contingencies upon which the estates are to vest must be within a life or 21 years after. As to the son unborn of A, when he comes of age.

Thus devise a term for years ^{may} ~~may not~~ be given to A. for life, & remainder over. but by deed it cannot for the life estate is at Law greater than the year estate.

Remainders ^{over} cannot be given to any person that is not in esse in the life of the first devisee. Of the Law of Connecticut

Whatever may here or in Eng. be done by devise, may be done by deed also. To prevent perpetuities no estate can be given by either, unless it be to a person in esse or the immediate descendants of him or her.

1st An estate to A. for 20 years, remainder to B. in fee is a good remainder both in Eng. & Connecticut.

2nd To A for 20 years, remainder to the eldest son of A, whilst son is not born. it is void by the English Law as the freehold did not pass out of the grantor, but such a devise would be good — By our Law it would be good either by deed or will

3rd An estate to A for life remainder as before, it is a good contingent remainder by the English, by deed or devise — good also by our Law

4th An estate to A for life & a remainder in fee to the heirs of B's eldest son, when B has no son is a bad devise as well as deed, for the reason see page 305 This would not be good under our Law

Lecture 20th June 23rd 94

Here Mr Pease repeated the Lecture, to be found in page 68-94th On the Law of Distribution as an introduction to the doctrine of descent.

Lecture 21st June 24 - 94

Our Law and the English differ in the Devise of purchased estates. In England every estate by devise dead of gift &c is purchased estate excepting alone that which descends by operation of Law In Com. Estates by descent

& by devise or deed of gift from an ancestor are placed on the same footing: & every other mode of acquiring property is by purchase

The former kind of property viz by descent &c may with propriety be termed ancestral —

We shall now proceed to distribute property in a variety of cases by the Stat. of Connect.

This Stat. embraces the whole English Law viz the Stat. of Bar. & those cases determined under that Stat. in Courts, with some alteration: & if well understood will lead to a thorough knowledge of, not only the Eng. doctrine of descents, but of that of all the United States founded upon the English —

Distribution of property by Stat. of Con.

In the distribt. of the following cases these directions are to be observed —

1st Calculate kindred as is done in the Civil Law according to the practice upon the Stat. of Charles remembering always to take the express direction of the Stat. where that has ^{either} preferred those who are more remote of kin, & postponed those who are near —

2. Treat the doctrine of representation as is warranted by the Cases determined under the Stat. of Charles —

Distribution by Stat of Con

3. Distribute as if the words legal Representatives were misplaced in the Stat. & as if they stood immediately after Brothers & Sisters of the blood.

4. Distribute as if the Stat. read "to the next of kin to the intestate of the blood of the ancestor" instead of "to the next of kin to, & of the blood of, the ancestor"

Unless these blunders are presumed, the Stat. will be found inconsistent with itself. Mr Sherman of N.H. was the draftsman of this act, & Mr Reeve observing the inconsistency of it as it now stands called upon Mr Sherman, who on looking at the Manuscript found that the above mistakes were made in the printed Stat. - to case has as yet come up in which these principles have been controverted, but it is apprehended that these alterations will prevail.

Case 1st John Stiles is dead leaving 3 sons & 2 daughters. The eldest child is dead, Charles & Polly.

Ans. They take equally

2nd Same only Ned is dead leaving A

Ans. A takes per stirpes with Charles & Polly

3rd Same but Charles is dead leaving B & C

Ans. A, B & C take equally with Polly $\frac{1}{3}$

4th Polly is also dead leaving D & E & F

Ans. They take per capita with A B & C

5th A dead leaving G & H

Ans. G & H take, per stirpes, A's share

In this case, the estate will take per stirpes, as in the Stat. leaving 3 sons & 2 daughters. The eldest child is dead, Charles & Polly. The parents are dead, but it is divided into 3 parts & they take respectively what they are entitled to. But not in other cases & it is not in the Stat. as it is.

6 J. S. left no issue & died seized of Black acre which came to him by descent, or by devise or deed of gift from his father Reuben Stiles, and of White acre which he bought with his own money. He left a ^{by father i.e. Sam & John had same father but diff. mothers} Brother Sam Stiles of the ^{by mother} Blood, & Tom & Sally Stiles of the whole Blood, & John & Susan Rowe of the ^{by mother} 1/2 blood, & Mary Stiles his mother.

Ans. Sam Stiles, & Tom & Sally take black, & Tom & Sally alone white acre.

7. Same - only Tom & Sally are dead without issue.

Ans. Sam Stiles takes Black acre, & Mary, white acre.

8. The same only Mary is dead.

Ans. B. acre as before & J. S. Rowe ^{and Sam Stiles} take W. acre.

9. Same only Tom left a son A. & Sally is living.

Ans. Sam Stiles, ^{Tom's son A. & Sally} ~~Tom & Sally~~ take B. acre, & A and Sally W. acre equally.

10. Sam is dead without issue.

Ans. A & Sally take both B. & W. acre.

11. The blood of the Stiles is extinct.

Ans. B. acre escheats & J. S. Rowe take W. acre.

12. Geo: Stiles, uncle of J. S. & brother of Reuben, alive.

Ans. Geo: takes B. acre & J. S. Rowe W. acre.

13. Geo: is dead, but A the son of Tom, & B & C the sons of Sally are alive.

Ans. A, B, & C take B. acre ^{per capita} & J. S. Rowe W. acre.

14. Geo: is living.

Ans. He, A, B & C take B. acre & J. S. Rowe W. acre.

15. Geo: is dead, F. & A is dead leaving D & E. & Sally is living - ~~as Sally & John & Anne take the acre equally~~
 Ans. Sally takes both B. & W. acre

16. Sally is dead leaving D & E -
 Ans. D & E take B. acre & John & Sus. Rowe W. acre

17. D is dead leaving F. & E is dead leaving G & H.
 Ans. D, E, F & G take B. acre ^{per capita}, & H. Rowe W. acre.

18. John Rowe is dead leaving I.

Ans. B. acre as before - I. takes W. acre with Susan ^{per stirpes}.

19. Susan Rowe is also dead leaving K & L.
 Ans. B. acre still as before & I, K & L take W. acre ^{per capita}.

20. The Stiles are again extinct -

Ans. B. acre escheats & W. acre goes to I, K & L ^{per capita}.

21. I is dead leaving M.

Ans. B. acre as before - K & L take W. acre

22. K & L are also dead. K left N, & O. L left P.
 Ans. Black acre as before. N. & O. take White acre

23. Anne, wife Geo: wife of J. S. is living -

Ans. Geo: takes B. acre & W. acre

24. Solomon Stiles the Grandfather of J. S. is alive.

Ans. He takes both B. & W. acre -

25. Geo: is dead but Humphrey ^{son} the Great G. father is alive.

Ans. Geo: & Humphrey take W. & B. acre -

26. Humphrey is dead & George, but Geo: left a son Q.

Ans. Q takes both white & black acres & so.

27. The only relation alive on the part of the Stiles

are Q the son of Geo: & Q's wife Edmund Stiles

Ans. Edmund takes both

Distributions on the Stat. of Connect -

28. Edmund is dead leaving &

Ans. 2 L & take both

29. D, E, F, G, H are also alive & also I. the grand child of Sam Stiles the half brother -

Ans. D, E, F, G, H, I, J, K & S take B. acre & all except I share in white acre -

The following cases relate only to B. acre.

30. Sam, Tom, Sally are alive. The estate did not come from Reuben but by deed of Gift or devise from Geo. Stiles

Ans. Sam, Tom & Sally take equally

31. Reuben is living, but Tom, Sam & Sally are dead without issue

Ans. Reuben takes

32. The Estate came from Moses Lamb by devise no was related to J. S.

Ans. Reuben still takes -

33. Same - only the relations are Mary & Reuben, Susan & J. Rowe -

Ans. Reuben & Mary take

34. B. acre came by deed of gift from Reuben & his only relation is Reuben -

Ans. He escheats.

Distribution of Real Property under the Law of New York

Case - J. died seized of R. estate Held - child & B. C.

Ans. All take equally

Distribution under the Law of N. York

2. A was dead leaving D, B was dead leaving E & F & C was dead leaving G, H, I, —

Ans. all the grandchildren take per capita —

3. The grandchildren are all dead each leaving children in unequal numbers —

Ans. The great grandchildren take per capita —

4. A was dead leaving D, B was dead leaving E & F, C was living —

Ans. D, E, & F take per stirpes —

5. B was dead leaving H & I, C was dead leaving K & L —

Ans. H & I, E & F, and K & L take per stirpes

6. Same, only C is living —

Ans. C takes $\frac{1}{3}$ - H & I $\frac{1}{3}$ - E & F $\frac{1}{3}$ per stirpes

7. A is dead without issue, his father Reuben & his brothers Sam, Tom & Dick & sister Sally. Siles & John & Susan Howe are living. Sam

is an half brother as well as John & Susan —

Ans. ^{as if purchased estate. Reuben may take it.} All the brothers & sisters take equally —

8. Same - but Reuben is dead —

Ans. Distribution as before All the mother's take —

9. Same. But the estate descended to him from Reuben & i.e. it is an ancestral —

Ans. Sam, and Tom, Dick & Sally take —

10. Mary Siles, ^{is living} the mother of Ed. Tom Dick, Sally

& John & Susan Howe & the estate came by devise from the brother of Mary

Ans. It goes to Mary unless the Stat. of James prevails which ^{will give the mother the estate to be divided to her brothers & take.}

In the above cases under the Stat. of New York the following rules are to be observed—

1. Real Property when lineal descendants are to take in equal degree of consanguinity per capita—as if all were children.

2. If the claimants are of unequal consanguinity as if some were children & others grand children then per stirpes.

3. Upon failure of lineal descendants the estate goes to the father unless it came to I.S. on the part of his mother—in such case it descends as if the father was dead.

4. When there are neither lineal descendants nor a father, altho there be a mother yet the estate goes to the brothers & sisters as well to the $\frac{1}{2}$ as the whole blood unless the estate is ancestral—

Then it cannot go to the $\frac{1}{2}$ blood unless such brothers & sisters are of the blood of the ancestor from whom the estate came—

5. Representation goes to Brother's & Sister's children notwithstanding the old stock are extinct, as in Eng^d.

Queens case not within the Stat. is governed by the Com. Law of Eng^d.

The distribution of personal property is according to the Stat. of Car.

In ancestral estate those of the alien & line are excluded—

Distribute the following cases according to the directions now given

1st. L. left no relative of the Ailes but Es:

She also left J. S. Rowe Distribute B. acre which descended from Rouler as if the word "of the blood" ^{meant lineal descendants or ascendants} ~~was taken~~ in the feudal sense —

Ans. It escheats

2. L's relatives are L. A. the Son of Lom; & B. C the Child of Sally are living & John & Sus. Rowe

distribute both estates as if "Representatives" mean the child of the dec'd without respect to the old stock

Ans. A. & B. C take both B. & A. acre per Stirpes

3. Same - but Es: is living - distribute B. acre as if representation was confined as in the last case - also distribute it as if representation was understood in the sense we have heretofore considered it - also distribute it as if "Of the blood" is taken in its feudal sense - Also distribute it as if of the blood meant "next of kin to, & of the blood of, the ancestor from whom it came & distribute W. acre as if representⁿ is to be understood as is supposed in the 2nd case.

Ans. If representation is consid^d as in the last case

A. B & C will still take per Stirpes to the exclusion of Es: & the other relations.

If representⁿ is to be understood as we have

311

heretofore consid^d it Geo: being of the whole blood
& equal degree with A & B will take with them

If taken in the feudal sense, the estate
will cleave -

If of the blood means of kin, & the Stat
means as it expressed ^{next of kin} "to, & of the blood of, the an-
cestor from whom it came Geo: will take the
whole.

A, B & C will still take where per stirpes.

4. It left no relatives but I the son of John Rowe
and his sister Susan - distribute where as if the
words legal representatives are rightly printed in
the Stat.

Ans. Susan take the whole, yet if the ~~if~~ term
"legal representatives" was placed as ~~they~~ ^{it} ought
to be I would take per stirpes with Susan

5. The relations are M the grandfather of John
Rowe & K & L the children of Susan now dead
distribute where as if there was no mis-
take in the Stat. respecting the terms legal rep-
resentatives.

Ans. M & K, L ^{her} take stirpes by the Stat as
it now stands

6. The relatives are Geo: Miller, D E F G H
the grandchildren of John & Sally, & I, J, K, L, M, N, O, P
the grandchildren of J & Sus. Rowe Distribute
where as if "of the blood" was used in its feudal in-

318.

Even Distributors

and while were as if the terms legal representatives were rightly placed.

Ans. B. acre escheats & while acre goes $\frac{1}{4}$ A
~~Humphrey~~ Geo. to Geo.; $\frac{1}{4}$ to D & E sons of A.
 $\frac{1}{4}$ to F son of B., and $\frac{1}{4}$ to G & H sons of C.
 The blood relations ~~are~~ ^{proportioned} in the
 Stat. to those of the whole in equal degree.

7. Same - but Solomon still the grand
 father is living. Distribute B. acre as if
 "of the blood" was used in its feodal sense.
 Ans. Solomon takes

8. Solom. is dead but Humphrey the G. grand
 father is alive. distribute B. acre as if
 "of the blood" was in the feodal sense - & dis-
 tribute W. acre as if the word legal repre-
 sentatives were rightly placed -

Ans. Humphrey takes B. acre, & W. acre is
 shared among Humphrey, Geo., & the represen-
 tatives of A, B, & C.

9. Humphrey is dead & Geo. is dead leav-
 ing 2. Distribute B. acre as if "of the blood"
 is used in its feodal sense, & W. acre as if
 the word legal representatives were placed
 rightly.

Ans B. acre escheats & 2, D, E, F, G & H take W. acre -
 See page 321 here the

Of Escheats

314

In case of an intestate's death if there be no heir to take the land, ^{reverts} to the Lord in Eng, & to the Public here. The Lord takes the estate in fee simple. The Public here do not yet see ^{may convey} a fee simple & put the money in the treasury.

Escheats are 1st From default of issue
2^d When no issue but Bastards. - & 3^d When a Monster

Aliens cannot inherit. - If they purchase it only passes thro them to the Public. - The Alien Law is here unsettled. -

If an alien has purchased & paid the money, & the purchase is considered void, why would it not be just ^{to} suffer him to recover back or does the ^{Law} Public take pleasure in cheating strangers?

The Question is undetermined. who are aliens? But once determine a man an alien & then the only question has the descent of the land he has purchased been lost. If so it may continue to descend forever & aliens be capable of inheriting.

- We have heard that in Westminster Hall it has been determined that these lands do not descend

320 Other Methods of acquiring property
1st by Deed. 2^d by Execution & 3^d by
Devise.

A Deed in Eng. is always a sealed instrument, but a sealed instrument not always a deed. A Deed is a sealed instrument in which it is contrived to let the consideration lie behind the curtain, or where it is by no means certain what the consideration is. In ^{this} case the action must be brought on the Deed.

In Connee. sealing is not necessary and a writing is a specialty or Deed wherever the consideration is removed behind the curtain. In Engl. if the considⁿ is expressed on the face of the deed an action may be founded on the original considⁿ & the writing given in evidence. But this is not ^{strictly} a deed. Receipts also are not here strictly deeds. If however the deed is taken up & no man can learn from the face of it what the considⁿ was it is then a Deed or specialty.

We are now going upon deeds as they respect the conveyance of land. The Law will not always apply to personal property.

For a continuation see page 322

1. I died seized of Real Property acquired by Purchase or descent no matter which He left issue A & B sons & C & D daughters
Ans. A the eldest son takes the whole —

2. Same only A is dead without issue
Ans. B takes —

3. A & B are dead without issue
Ans. The daughters take equally —

4. A left a son C & Daughter F —
Ans. C takes —

5. Same, only A left F only
Ans. F takes —

6. A & B are dead without issue & C & D are dead
C left two daughters G & H & D left 3 Daughters I & J & K.
Ans. They take per capita

7. Same only G was a son

Ans. G takes alone ^{if the estate is acquired by purchase}

8. I left no issue. He left his Father Reuben, his uncle Geo: & Brothers Sam (who is the eldest & of the 1/2 blood) Tom, and sister Sally — and John & his an issue

Ans. Tom will take the whole — Reuben is excluded as it is a principle that Real Property shall never ascend. Sam is excluded as being of the 1/2 blood & John & Susan also Sally is excluded on the ground ^{that females are not to take when there are males} ~~that females are not to take when there are males~~ for the whole subject the will of the

Of a Consideration in a Deed.

Sec 26-94.

1. There must be a consid^r expressed in the deed or one actually given - if the deed is destitute of both these, it conveys nothing.
2. The consid^r must be good or ^{valuable} valuable. Money and Marriage are ~~good~~ ^{valuable} consid^rs. There are the only good consid^rs against creditors. A good consid^r is love or natural affection - But such consid^rs will ^{not} be sufficient to bar creditors of the grantor from attaching the land. Yet it has been decided that if a man has made a settlement on his son &c, & afterward was fully able to discharge his debts, but the creditors neglected to call for payment & suffered him to waste his property so that he finally became unable to satisfy them, they shall suffer the consequence of their negligence & shall not come upon the son -
on this subject See Cowpe 705. 432
3. If there is a consideration expressed in the deed such deed will operate to convey the property whether it is true or not. The reason is not that a grant under seal at such; is good without a consideration, but because the grantor cannot prove by parol testimony a fact contradictory to the writing. A. It is then this is the reason, a grant - acknowledging a consideration & at the same time

detailing what it is, & it appears that it is in fact none, the conveyance deed would be good for nothing.

5. If the consideration is an illegal one, this may be always proved to destroy the operation of the writing. If the non existence of a consideration where one is acknowledged that cannot be proved - but ^{on the ground of} the turpitude it may be impeached at any time.

6. Tho it is true that the considⁿ cannot be denied so as to prevent the transmission of the property - yet the sum expressed in the deed is not conclusive between the parties that that was in fact the sum given - It is no more than *prima facie* evidence - & if any cause requires an inquiry into the quantum, it shall be made as in a suit for damages on a covenant of warranty &c.

7. When the conveyance is only on a good consideration this tho' good betwixt the parties may not be so as it respects 3^d persons interested therefore it may be enquired into whether the consideration was good, or whether there was any.

8. Voluntary conveyances for a good consideration are not as such fraudulent - It is only the presumption, but this may be rebutted.

Lecture 27th Deeds of Land 1794

At Com. Law, land passed by Parole with the ceremony of delivering ^{corporal possession} turf. It became necessary afterwards that there should be deeds sealed - Originally every person or family had its private seal & were probably unable to write. Hence the substitute of the solemnity of sealing - But family seals were soon disused & any seal became sufficient - Afterwards deeds sealed became absolutely necessary by Stat. 130 by this time civilization had proceeded so far that men wrote their names & all reason for sealing ceased. This business of sealing ridiculously extended to the present time & is in Eng. is indispensably requisite. With us they have lost most of this virtue - But custom still preserves them in deeds of land See Co. Lit. 231 -

There are a few instances where a covenant ^{imperfectly} not sealed may operate as if there are ³ signers & only one or 2 of them seal. 5 Co. 23 2 Lev. 220 If a seal is broken off by accident the Deed is in England void, unless it is in the protection of a Court - as if a precept is made of it & since we should seal off, it is then good

Deeds of Land

When a grant is made & an exception provided for, sometimes the thing excepted will pass & sometimes not. At first sight the authorities may perhaps appear inconsistent, but they are reconciled by attending to a rule of law we receive -

Whenever the general term which would convey all that was granted is made use of & the thing excepted is mentioned by its appropriate term, the exception is good. As if a tract of Land is granted & house standing on it is excepted, the house will not pass - but if the specific term is used & a part is carved out of that, the exception is void. As if I grant my house & shop excepting the shop - the shop will pass notwithstanding. Or if I grant 20 acres of Land excepting one acre - the exception is void.

A man grants all his estate at such place excepting a certain farm & it appears that he owned no other property in that place, that farm will pass.

On this subject see 2 Roll 45 & Hol. 170
see p. 47.

Deeds must be delivered to be valid.

No fixed rule can be laid down by which we can determine what shall be a delivery. But when that is done which convinces a rational mind that there was a delivery, it shall be so construed. —

If the grantee has the deed in possession it is presumptive proof that there was a delivery yet this presumption is liable to be rebutted. Co. L. 36. 2 Roll 24.

Of Escrows

When a deed is delivered to a 3^d person to be delivered over to the grantee on the happening of a certain event, it is called an Escrow. On the happening of the contingency, the deed may be delivered by the stranger & is operative from the first delivery.

If this 3^d person misjudges of the fulfillment of the condition & delivers over the deed when it is not fulfilled, the point may be litigated & if ~~the~~ it finally appears that the condition was not yet performed, the delivery will be consid^d as a breach of trust & the grant passes nothing 2 Crok 85. C. L. 36. This condition may be by parole — no writing is requisite.

Of Deeds of Land.

If a man delivers a deed saying if you do not on your part do such a thing then I declare that this my delivery is nothing at all, yet the deed is good & the condition void. Mr R. is of opinion that this is unreasonable. This point has been lately decided before our Courts & determined ^{the deed} to be good. The court fell in with the current of Eng. authorities. Those against this decision are Moore 697 - Cro. Eliz. 835. On the other side Crok. - Eliz. 520. 884. Hob. 24. 9 Co. 137.

Deeds operate from delivery. The date is presumptive evidence of the time of delivery, but this may be removed & the delivery proved to be at a subsequent or antecedent time. - Yelv. 133. 2. Co. 5. 2 Roll. 21.

Lecture 28th July 2^d 1794 -

1. In ^{common} ~~the~~ Deed of conveyance there are 2 covenants

1. That the grantor is lawfully seized of the Land - 2^d He covenants to warrant the title against all other claimants.

2. The grantor is liable to be sued upon it by all persons claiming.

In the event of litigation the grantee need not wait for a trial, but upon a

sonable conviction of the deficiency of the grantor's title he may bring his suit. If this suit is lost & the grantor's title is found good, but the g-tee is afterwards evicted he may bring another suit against the g-tee on the count of warranty - & the g-tee will be compelled to answer for damages as well as the original tenant given for the land.

When the writ of ejectment is brought against the g-tee he must notify the g-to of this fact he may come in & defend the title - The common way of notifying is by writ of voucher and this mode is not absolutely necessary -

If the g-tee neglects to notify, the title & bargain may be litigated between the g-to & g-tee & if the title is found to be good the g-tee must pay his damages; or if the title is good the g-to has his only remedy in a petition for a new trial with the ejector -

Of Quitclaim Decrets

These are attended with no warranty & if it is a bargain of hazard the g-tee can have no remedy against the g-to for the title is what it is. If the g-tee gives a full consideration for the land & expects that there is no hazard in the

Dec. 11 1820

business, but that he has a judgment in the
he has his remedy against the g-tor for money
had & received.

It is common to have subscribing
witnesses to a deed. By the com. law this is un-
necessary, but by our Stat. is absolutely neces-
sary to the validity of a deed. There must
be 2. & if they are dead their handwriting is
to be compared, & if it appears to be theirs
it is evidence that the deed was executed
in their lifetime.

As it is a maxim that the high-
est evidence the case will admit of must be
introduced. Courts have determined that if
proof is not produced why the subscribing wit-
nesses are not bro't in when a deed is chal-
lenged, other proof is inadmissible.

If the g-tor acknowledges the deed
it is unnecessary that any ^{other} person should be
called to establish it, as between g-tor & t-ee.
But as between the g-tee & 3^d persons the law
is otherwise.

Off, here are not 2 wit. for the deed is
good between g-tor & t-ee it is defective as it
respects creditors. And the current of author-
ity establishes the principle that even vol-
untary purchasers knowing full defect may take

as much as the title of the land. If the title
is given to him he has no remedy against the grantor
But in case of a settlement upon a ^{particular} title it is a
question whether other children can come in & take
advantage of the defect.

A deed must be recorded. This was not the
case by the Gen Law but made necessary ^{here} by
Stat. - We have also a Stat. ordering deeds to be
acknowledged before a justice.

A copy of a deed is considered evidence of its
execution tho' this opens a wide door for fraud.

In case where there are no 3^d persons concerned
& the parties title is defective by a delivery of a
negotiable instrument, Chancery will establish his title.

When any person for fear of creditors de-
lays to put his deed on record the creditors may
upon conviction of the fraud & belonging to him
seize upon it & take it by execution, but in this
case the title would depend upon memory &
thus be defective. But Chancery tho' they cannot
give a title, will establish his upon their record
& this will furnish the highest ^{of a title} evidence.

Of Fraudulent conveyances

If a man convey away his land for a ~~small~~
~~little~~ consideration under its value to defraud
creditors it is fraudulent & void as to creditors
good as between the parties & the donor & donee.

of seeds of R. sp

This is the case with all conveyances which
discover ~~some~~ an intention of collusion in the
parties, except where the g-to is ^{other} ~~subject~~
property sufficient to discharge his debts. In this
case tho' it is manifest that the g-to meant
to keep that property from Creditors they cannot
take advantage of it—

This is not the case with personal property so that may be sold at the best & in time & turned into money while R. King cannot in this State - tho' in N.Y. it may

If a creditor purchases an estate of a debtor in trust to secure his debt, under its real value & to keep it from the hands of other creditors, He is liable not only to lose his purchased estate but also his own debt. For it is just as fraudulent as if the debtor owed him not a farthing. The death of a debtor is never to affect the right of creditors as to his fraudulent conveyance. ⁵⁸⁷ 2 Linn. & East. In this case the Eng Courts have determined that one guilty of such fraudulent conveyance shall be "Ex" in his own wrong & may be sued by the creditors.

But our Gods have determined

that after the estate has become insolvent & it is necessary to resort to the Court that the Court shall no longer be considered as a representation of the g. for but as an agent of the creditors and as such may the the g. be in trust & may be sued by the creditors —

The title of an estate may be transferred ~~transferred~~ may be considered as existing in the g. be liable to the creditors for the creditors showing it to be a fraud —

Lecture 29. July 3 1794

The Law respecting fraudulent conveyances is different from that which regulates other illegal transactions — When the fraud is in the consideration & not in the execution such contract is valid as between the parties but if the fraud is in the execution, the case is different — for no Court of Law will permit any contract to be executed where there is fraud exercised in the execution — But in Chan. no where be fraud in the consideration, yet the transaction is void & relief may be had — In mercantile transactions ^{the g. for} fraud in the consideration, at Law ~~renders void~~ ^{voids} the contract — In Con. the C^t have laid it down as a rule that where the fraud is a total fraud, it is void in the consideration even if

it shall be the same at Law as in Equity
This rule is not extended to cases where the fund
is only partial.

Of Writation by Executions

At Com. Law no execution could go against the
lands of a debtor except in the hands of the heir
for the payment of the latter debt. The Execution
at Com. Law were 3. 2 or 3 of Cok. Rep. 11.

1. Levare Facias against goods & land
2. Fieri Facias - against goods only &
3. A. Capias ad satisfaciendum ag^t the body

On the Lev. Fac. the land were not delivered
to the creditor but only the emblements of pro-
fits, rents &c. see Plowd. 441.

A Fieri Fac. went only against goods & chattels.
The ^{emblemment} ~~emblemment~~ were included. ~~Emblements~~
are so far considered personal property as to be taken
on Fieri Facias. But the other profits are
not as gross &c. 1 Salk 368 - & Cok. Rep. 171.
& term for years may be taken by Fieri Facias.
& extended on being appraised of by 12 men
till it was satisfied the debt.

The Capias ad satisfaciendum went against
the body only & that in the single instance alone
of a trespass vi et armis. This kind of execu-
tion has since been extended to all kind of
accounts, debts, & actions on the case for debt.
This execution may be pursued till satisfaction
is obtained.

Of Execution by Stat. Writ & Ret. 333
Writ, & Execit.

The Stat. Writ went against lands & extended them for the payment of Merchants, & no other debts. The Debtor must have gone to see a Magistrate & acknowledged the debt. — The Stat. Writ is much the same originally only permitted among traders.

Execit goes against all goods & $\frac{1}{2}$ of the land of the debtor. The creditor may take any or all of the goods & have them seized off & sold & after there are gone he may go against $\frac{1}{2}$ of the land & that will be extended.

Of Connecticut Executions

These go against the goods ^{and land} & for want of them against the body of the debtor — if no goods land may be taken — It however does a-
gainst no lands but see simple — The Sheriff takes 3 freeholders from the County — one appointed by the Creditor — one by the debtor & one by the Magistrate & the land is seized off & see simple — All other kind of Real Property are daily extended by custom in that State tho' there has been no adjudication of Court. This seems to be left as at Com. Law. —
Nothing is all good taken in Execution must be taken up 22 days before sale & carried & sold.

Executions

at the Post- Office- How can Emblements
 leases for years be lost to the Post? The
 Stat. seem not to have contemplated this
 but it is apprehended to be left as at Common
 as ^{also} rents due &c

So steps in action can be taken
 in execution as in d. d. &c &c

- Cases where in Connec- we must resort to
 the Com. Law

1. To get an estate for life or in tail
 2. To get Emblements & leases for years if
 they cannot be sold ~~by~~ ^{under} our Stat. which re-
 quires them to be ~~fold~~ carried to the Post
 3. To get the rent's yearly accruing on lease.
- Lecture 30th July 7th 1794

Of New York Executions

Real property is liable to ^{be sold upon} sale
 at auction- It is bound from the time
 the judgment is obtained, provided certain
 ceremonies are complied with- In Connec-
 tion to see how the creditor may at any time
 reach the estate & thus create a lien —
 How a creditor may take an execution
 against the estate or the goods or the land
 & land in order to bind the land from the
 obtaining of the judgment, the time & the manner

of the judgment must be entered on the rolls.
In effect the execution must first look to good
execution - for want of these land may be
taken & sold.

But what the Creditor elects to take
the land & imprisonment - the prisoner dies in jail
the creditor sues for a new execution -

The creditor is bound only from the time
of the execution being delivered to the Sheriff.

Of Alienations by Devise.

In general Real Property did not be-
come devisable in name tho it did in fact
since the 32^d of Henry 8. & the power to devise
was completed under Car. 2. - But land
was in reality devisable long before by means
of Uses. The inconveniences of this practice
gave rise to the Stat of Henry 8. which executed
the use, i.e. transferred the fee to the Use-man -

The Stat 34th of H. 8. mentions only tenants
& Executants in fee simple - all persons having
whom might devise -

It became a question whether profitable
Estates were devisable - By the former author-
ities they were not - but by the latter they
are 3 Lev. 427. 4 Black. Feb. 222.

At com. law an estate per autre vie might be
devised. but ~~the Stat~~ a Stat - against that -

Lecture 31st July 8th 1774

1 In Com. a devise vests the devisee with a defeasible title & such devise takes whether the will be proved or no—

Any instrument for the disposition of property made in contemplation of death is a will be the form of it what it may—
Finch 195—1st Mod. 117

It must be signed by 3 witnesses—

If the instrument of conveyance be good as a deed the grantee takes fraudulently as to creditors & they may find relief by application to Chancery & treat him as ex de son tort— If the instrument be a will then the land may be sold for creditors by the Court of Probate. Or if the instrument be neither will or deed, the grantor or donor dies intestate as to that estate, & the land is sold by ^{order of} the Chancellor for creditors.

Wills may be made at different times & on different papers. They will stand as long as the different parts are consistent with each other—If inconsistent then the last alone is to be effectual Eliz. 721. 1st Ver. 187.

A deed may be good which in itself is uncertain but depends upon another instrument to which it refers—Jac. 144. 1st W. 5 B 1020

Of Codicils

339

These do not destroy a former will - only by addition subtraction or by alteration. They are mere appendages.

Requisites to a Will

These are the same in Eng. Com. & N.Y. They are governed by the Stat. of Car.

1. It must be written.
2. Signed by the deviser, or by one by his desire & in his presence.
3. Attested by 3 witnesses, and
4. Subscribed by ~~them~~ ^{him} in the presence of the deviser. 2 Atk. 368.

It has been questioned whether a will of land ^{not} lying in Eng. must be made accordg. to the laws of Eng. 2 P.W. 291. It must - If a contract be made out of the State to be executed in the *Loco* where the contract was made, shall not prevail, but if made generally not alluding to the execution any where in particular, then it will -

A man in his will may give a power to a 2^d person to give certain land to 3 persons whom the 2^d pleases - 1 P.W. 740 - This 2^d person makes a will appointing these 3 persons - ^{must} ~~must~~ ^{must} be executed formally? It is only a power of attorney & need not be attested of by will -

If a man gives money charged upon land, the will must be ^{formally} executed 2 Atk. 216. 285 -

Of Wills

It is customary in Eng. ^{Wills here} to give the ex^{ra} power to sell lands to pay debts. This must also be formally executed. 2 Ves. 179.
He need not go the Ct of Probate for liberty

Of Signing

Respecting this the Eng. law is our law for we adopted the Eng. Stat. after it had its construction. The will is good if signed by the Testator any where on the will. But if it be in proof that the Testator meant to sign it formally then the will is not good. 3 Lev. 1. 3 Mod. 213 ²¹⁹ Doug. 241 Stra. 764. 1 P. 313 - sealing is not signing.

If the devisor say to the witnesses "I write this will you subscribe it?" This is a good signing. The witnesses are considered as attesting to the sanity of the Testator 3 T. 93 or 93. For this presumption may be removed by other proof. 2 Ves. 455. The devisor says "this is my will" not saying it was his hand writing, yet the Ct held this a signing. Some authorities however are against this.

Lecture 32^d July 9th 1794

The whole will must be present at the attestation.

The witnesses need not all subscribe at the same time - The 1st wit. may

Subscribe to the 1st sheet. The 2^d to the 2^d sheet.
& the 3^d to a 3^d sheet & yet the will be good
3^d Bur. 1775⁴. It is enough if the Testator in the

possible view of the witnesses when they subscribe
Lack. 395³⁵. 1st B. Can. 199^{or 99} - 1st P. W. 239 or 299 Carth. 81

But if there is any fraud - as if the witness subscribes
with the Trinity, consent or intention of the
Testator who in his presence the whole business
is a nullity 1 P. W. 340³⁴⁰

A mental capacity is also understood
by his presence See Doug. 240 Wright & Price

That a will was executed in the
presence of the testator is always to be proved
But suppose the witnesses dead then their
hand writing is to be proved but that only
proves that the will was subscribed - In such case
the courts will presume that they did subscribe
in the testator's presence & this presumption
may be rebutted -

In Carth. 35 a case where 2 wit. signed the
will & afterward a codicil was made & subscrib-
ed by 2 wit. - the will was not good within the
Stat. But if the Will & Codicil be on the same
piece of paper the execution of the Codicil is
the execution of the will - And also if there
are several papers, the last referring to the rest
the execution of the last is that of the others -

That the Wt. need not be together when they subscribe. 2 Atk. 177.

There must be 3 credible Witnesses -

2d Ray. 505. A credible witness is one who is competent & one who could be improved as a witness if he had not subscribed.

Can non-credibility at the time of signing be urged by any ex post facto ^{matter} ~~law~~ 2 Br. 1153.

This question has been strongly litigated in Eng. & Con. In Eng. it has rec'd several decisions & the authorities are equally balanced 6 Judges have decided one way & 6 the opposite - Lee C. J. B. R. against Jurgin - Mansfield in favor

In Con. one case came up before the Sup. Ct. & they determined that the wit. might be purged - The Ct of Errors reversed their judgment - Since that another case has come before the Sup. Ct. & they joined with the Ct of Errors - This went to the Ct of Errors also & they turned from their former decision & reversed the judgment of the Sup. Ct. again -

Lecture 33: July 10th 1794

What is a Publication?

Any act or declaration that imports a solemn intent of the Testator to have it a will - Some act

Dr. Williams' Will -

English 323

or words are necessary besides what the Stat says.
For this subject see 3. 4th. 156. & Vinces 125 -

Where the testator said to witnesses "take notice"
with mentioning that it was a will they
were about to sign; This was determined a
sufficient Publication -

Who are excluded from devising.

On this subject it is not designed to include
wills made under duress &c which will ap-
ply to all persons generally - but other ^{classes of} persons
particularly specified by the Stat -

The 32^d Henry 8th says "all persons having
land may devise" This did, by no means,
mean to create a new power to persons pre-
viously disabled but only "that all persons
capable of devising in other cases, might devise
lands" - The 34th of H. 8. was made explanatory
of the former Stat. This has excluded - Feme Coverts,
infants, idiots & all non sane persons - The Stat
means "all natural persons" not bodies politic

Our Stat. has all the other exceptions
but "Feme Coverts" - & declares that all persons
of right understand, & of 21 years of age (not
otherwise legally incapable) may devise land
&c - The question whether Feme Coverts can

N. P. Mills

devise, must depend then on the Com-
Law - for the disposition of this subject
see Mr. Reeves's Essay -

Lecture 34th July 10th 94

If a g. to convey land not his own
& afterwards buys it, the conveyance is good
as between him & g. tee - But if a bona
fide purchaser after the g. to's purchase has
the land it will not operate - From this
we see the principle that no land can be con-
veyed by devise but what the Testator pos-
sessed at the time he ^{executed} made the will - 9 Mod. 18

It then may well complete any contract
by which a Testator would acquire property
he is consid^d as owning such property & it
will pass under a devise 2 Will. & 31. 1792. 1793. 1794.
Such equitable interests will pass under
a sweeping clause as "all my Real property".
2 Will. 1029. This is a case where it would not
pass if the Testator acquired it after the will
was executed -

A man may not only devise away his
estate but may ^{also} ~~devise~~ ^{grant} a power to sell
it - The law on this point is but little settled
at present -

When one devises a man the power of
selling real estate or some other estate to pay
the debts of the testator, it is said that the
legatee cannot require to give him no more of the

344

Will
devise is a nullity - The fact is they cannot
tell what the testator means if he speaks in
the vulgar language - But if he uses a techni-
cal term, or any other extraordinary words which
a man of common sense would not think of
using evincive of his intention that the trustee should
sell it; then the devise is good - One set of these ex-
traordinary words determined by Ct^s to be valid.
is - "To him to sell, & give a title such as I could
myself" This the Ct^s made out to understand -
When the land is sold the money is in the
trustee's hand to pay debts, & is in the same
situation as the property of an intestate. More 774.

Our Stat. has given the Ex^r the same power
to sell as may be given by will in Eng^d.
Here when an estate is ^{solvent or} insolvent the profits
will descend to the heir - yet when insolvent the
heir is liable to their amount -

Suppose the Ex^r will not execute
this power to sell Chancery will order him
to pay ^{the debt} if he is able or sell the land & if
he is unable they will decree a sale -

But suppose he refuses to be ex^r then
C^{ts} are trustees & may execute the office
~~of ex^r & sell~~
If the testator orders his land to be sold
without naming a person to sell it Chancery have
determined the ex^r to be the man

Where there is no Ex^r & Land is devised to help^d for the payment of Debts, the Ct. has determined the heir to be the trustee - 1 Lev. 384 -

Personal Property coming to the hand of the Ex^r he may release, give away &c as he pleases but he is accountable for their value. Real Property however, ^{devised to help^d} he can't ~~do this with~~ manage in this manner - He does not sell as Ex^r but as Trustee & if he should renounce his Executorship, still he may retain this trust.

When 2 Ex^{rs} are appointed & one dies the English Law is that the other cannot sell lands devised to help^d - The reason of this is that they are trustees as to the selling of land, & the execution of their trust must be joint - One establish, then sell as Ex^{rs} & one may convey - When the land is more than sufficient to pay the debts, the ex^r must have the surplus of the money attained to the heir -

Lecture 35th July 12- 94 -

Who may take by devise?

Common Law is no disqualification - Nor taking however depends upon the purpose of the trust? This is the Com Law but by application to Stat^{ute} they may take in defiance of him.

Aliens are not capable of ~~test~~ holding estate, by devise. yet he may hold till some proof is brought against him & he is proved an alien. Then the devise is lost & goes to the Public. It cannot however descend to heirs, even if there has been no proof against him & the heirs were born in the realm.

Bastards are capable of taking by devise ^{as} ~~as~~ filii nullius. If however the devise is ^{to} a bastard son of such person distinguished in other way, it is good for nothing. But if he is mentioned by his reputed name then he may take notwithstanding he is immediately after called a bastard. — Elix 509. Co. Lit. 123-3

~~There is a case of Moore where he took by being called his mother's bastard son, but this has ever been consid^d bad law. See 1 Wk. 410~~

In ~~some~~ Raym^d 82-83 there was a devise of a man to one of his daughters who should marry a Norton. One of them married a Norton & the heir endeavored to invalidate the devise on account of the uncertainty ~~whether~~ which daughter should marry, or that they might all marry Nortons. yet the Ct determined that the first who married should take. — This is a strong case to show that an executory devise may be good notwithstanding it depends on an uncertain event.

A devise to a child in ventre, & more may be good - If the intention of the testator, independent of the words which give the estate, appears to be that he should take when born, the devise is good -

Term 428. Moore 177. 637. Cor. Elis. 423. 2 Salk 230
 Noll Ab. 609. 1 Lev. 135-156 1 Pym 109

If the person is described so that there is no doubt the devise is good - as to the Clerk of the County Court &c, or the treasurer of such a State. Hob. 32 -

If a devise is made to a particular family the heir of the family takes -

Where such a man's posterity is devised to - if he has none his collateral may take -

"To one's nearest relations" all in the same degree take, if personal property, & if real & personal the Real shall follow the personal -

1 Vern 335 - But if real alone it is not so yet

this is apprehended to be the best way -

"To One & One's children" is also a good ^{term} ~~word~~ to pass property in a devise - If at the time he has no children he will take the whole - if he has children they will take with him jointly - 6 Rep. 17 -

yet ^{the testator's} his intention might be frustrated entirely

as in the case of mean heirs &c

"Heirs" of itself no word of purchase
 It only expresses the quantity of estate - it is not descriptio personarum

432 348

Wills See page 432
Of Revocations

Any time after making a Will the testator may revoke it. The only difficulty is in knowing what is a revocation.

A Revocation of the person proper would be a Rev. of that till the 29th of Bar.

* Here we have no Stat. respecting Revocations. It seems therefore that our Law is the Com. Law of Eng. ^{as it stood} previous to their Stat. of Bar.

Revocations by Com. Law are express or implied. The former written & parol. There is no particular solemnity required to revoke. Any solemn declaration written or parol indicative of the testator's intention to revoke is sufficient. Words in a passion &c will not do. But if he call on witnesses & coolly tells them he revokes his will of such a date or says "This is not my will it is a good revocation. 1 Will. 1615. Jac. 115. Bar. 51. Elix. 306.

Implied Revocations are also from writing, or from words a solemn declaration which if compared with the will is found inconsistent with it is sufficient to destroy the will as to that part which is thus inconsistent. As if a man had disinherited his heir in his will & afterward tells witnesses that his heir shall not be disinherited &c. 3 Wills. 511.

(and therefore no solemnity is wanted)
 * as the Stat. of Hen. 8. did not require any legal solemnities to the will.
 which the Stat. of Hen. 8. did require will Mr. Heust. says stand firm. Yes see page 330-1-2-3-4-5

The existence of a 2^d Will inconsistent with the former is a Rev. 3 Mod 203 Cowp. 87. 2 Bul 592 - 3 Wills 497. 7th B. P. C. The precept

A Codicil also if inconsistent with a former will is a Revocation to the extent only of that wherein the Codicil differs

Lecture 36th July 1st 94.

A subsequent different will or Codicil if made upon a false impression in point of fact is no revocation. but if it is false in point of law it is a revocation tho' the deviser's idea respecting the law is a mistaken idea - where a 2^d will is made so that it is an implied revocation & that 2^d will is destroyed, cancelled & it is a setting up the first Will. 4 Burr 2512 - If the 2^d will contain a clause of Revocation expressly & then is cancelled & the 1st will is found entire, yet it is ^{no} Revocation. But if it had not been a will the judge said it should have been a revocation as a deed. Or if the 1st had been cancelled the cancellation of the 2^d whether in that 2^d there is a working clause or not, the first will is revoked - Cowp. 49-53. - Any ^{unoccasional} act evidential of a design in the testator with words or writing as cancelling, saying ^{he will} & animo revocandi is a revocation.

An alteration of the Testator's circumstances is also a Revocⁿ. As Marriage. & afterwards issue born. Marriage & issue however are only presumptive evidence that the testator would not have his will stand. & testimony is admitted to rebut such presumption. If after all the wife & issue are provided for it will not be a revocation as perhaps a part of this estate is given away & enough is still left for his family *ppm 304. in note - A. Mem. 2182 - Doug. 35. 38*

A feme makes a will & marries this is a revocation as to the personally, ^{as the property} ~~as to the personally will operated as a disposition in her husband - as to the Realty the will is~~ ^{standing} ~~unchanged~~ so that if she died ^{before her husband} ~~before~~ the will would not operate, yet if she becomes discover the will is good *A. Rep. 61. Plowd. 343. The reason of this doctrine* The fact prevents her making a will. The total change in her circumstances are such that it is more than probable she would not wish to have the first will stand.

The will of a person who becomes non compos still remains his will *A. Rep. 61.*

An actual alteration of the estate of

The devisor is a revocⁿ. The ~~Rule~~^{Question} is not whether he intended a Revocⁿ or not but whether he intended an alteration in the estate - if he did it is ~~an~~ ^a ~~altera~~ ^{Revocⁿ} as if a man should devise & then enfeoff another to his use or if ~~A~~ ^{he} alienes then repurchases it is a Revocⁿ ^{notwithstanding} 1 Roll. 615. 9th Aff. 578.

Before these ^{cases} ~~intention~~ ^{intention} the true intention of the Testator has been the leading rule. But in these cases that has nothing to do with the business -

A Tenant in tail made a will & then suffered a recovery ^{on purpose} to give effect to his will. Still this was a Revocⁿ 12 Geo. 108.

Even if he was in fact seized in fee & revivied & apprehended that it was an entailed estate & should make the ~~propos~~ ^{propos} in tailmt. on purpose to give his will effect it is a Revocⁿ 3. Aff. 803.

The rule is the same in equitable interests only. A man having an equitable interest devises it & then takes a legal conveyance. This is no revocⁿ 1 Will. 311.

But to alienate a legal into an equitable estate would be a revocⁿ after a devise. There is no revocⁿ after a devise. I. Ray 1240.
But only in a total alienation of the estate

but an intended one, which fails thro' some defect in the conveyance, is a revocⁿ as in Pop-
ham 108. where a devise was made & afterward
a feoffment of the land of which there was
no reversion - This was ~~not~~ a Revocⁿ 1 P. & J. Judge Black-
Rep. 3.49. Roll 615.

These cases as we have seen depend
upon the testator's intent to alter the estate
& if there was none, then it is no revocation.
As where A. devised to B. & then enfeoffed C. to
his own use for life & there was no livery.
(He asked if it would destroy his will & was
informed it would not - In this case there was
positive proof that he meant not to alter
the estate so as to injure his will whereas
in the other instances the law presumed
he meant to revoke by the alteration -

A man devises to a corporation which
cannot take - This is a revocⁿ as it shows
his intention to alter the estate -

3.4th. 72 - 1 P. & J. 405. 9 Mod. 190 -

Lecture 37th. Ann. Dom. 1794 July 15.

A man must be seized till death for
if devised it is a revocⁿ But if the devisee
is thro' covin it will not be a revocⁿ Roll 613. 379.

If the Testator is seized at the time he
devises & afterward reenters it is no revocation.

Land devised & then conveyed the conveyance is a revocation pro tanto - and if conveyed to the devisee a revocation ⁱⁿ toto - 1 Salk 158. 2 Atk 748. 2 Lohay 968. This an exception to the rule laid down before respecting alteration of the estate -

Where a man devised his estate & afterwards for a particular purpose has sold it to raise money for inst. to pay a Debt or if he gives in his will a power of disposing of this estate to satisfy the debt - This only a revocation pro tanto 2 Atk 272.

Where an estate is devised in fee simple & a smaller estate is carved out of this it is a revocation pro tanto. As where a lease is made after the devise in fee simple Roll 616-18 Jac. 49.

The above revocations are by com. Law. The English Stat. left the Com. Law as it respects implied revocations as was ^{it} in an affirmative of the Com. Law in ^{an Eng. Stat.} which prevails in most of the States - no express revocation shall be good unless by a subsequent will or a deed, or a writing expressive of his desire to revoke signed in the presence of 3 witnesses -

Of implied Republications - When there has been a subsequent will revoking a first & then 2^d is destroyed with a design in the testator to destroy, then the 1st is republished by implication.

A Codicil also executed according to the Stat. relating to a will is a republication implicitly. 3 W. 180. 9. Mod. 68. 18. 1000. 13. 185. On a re-publication the will speaks as a new will just made. And if the testator made a will & afterwards purchased other property than what he first devised & the terms of the first will will embrace this after purchased estate, it will pass by a Republication. — As if one devised "all his Real property" & after such devise acquired other Real property a number of years afterwards he republishes the will all the real property he owned at the time of Republication will pass — 4 P. W. 275. But if the will cannot embrace the after purchased estate it will not pass as if Black acre & White acre were devised & he afterwards purchased blue acre. Blue acre cannot pass by a Republication because it is not embraced by the will.

Parol Averments

When declaration of the testator to show what he meant is necessary to give an import to the language of the will sufficient

from the natural import are inadmissible.
5 Rep. 68. - 2 Atk. 216-373. Plowd. 345

But averments of facts to give direction to a devise consistent with a will are admissible as where a man had 2 sons of the same name proof was admitted to show which the testator meant &c - Or where there were 2 farms of the same name - 8 Rep. 155. 5-68 - 21 Atk. 137.

A Rule to be observed respecting the averment of facts is - "If the uncertainty who or what was meant arises from the face of the will no parol proof to explain is admissible. But if it grows dehors the will it may be admitted."

As a devise to A. B. - There was a Father & a Son of that name 6 Mod. 199. 1 Atk. 411. 2 V. 216

Parol proof is admissible to show what was meant where ^{there are} words of equivocal import so that an ambiguity is created by the use of them - Moore 185. as where son is used for grandson &c &c

In a grant if a man's name is mistaken altho the description be complete it is no conveyance but in a will the law is otherwise 1 Atk 410. 2 Atk 240 - 2 V. 216. 1 P. 136. 8 Vin. 187.

Lecture 39. July 1st. - D 1794

Wherever words are used which have a certain technical meaning, let this be ever so clear on the face of the will circumstances may be offered to prove that the testator meant

must necessarily have meant differently
 as in case of a devise, "of all my estate my
 debts being paid." The technical meaning of
 this ^{is that it means personal property} ~~is that it means personal property~~ ^{is that it means personal property} ~~is that it means personal property~~
 proof by parol was admitted to show that the
 circumstances of the testator were evidence of
 would not admit of such legal construction
 as the personal estate was worth only 10£ &
 the debts amounted to 400£ It was therefore
 manifest that the testator meant to devise
 a fee simple & the devisee was allowed to
 take accordingly. - 6 Rep. 16

If a man has children & a devise
 is made "to him and his children" the children
 would take with him - but if he had no
 children it would be a word of inheritance &
 considered as "to him & heirs" parol proof is ad-
 mitted to show whether he had or had not
 children.

In Salk 234 there is a good case for
 this purpose. It has settled the law that
 such external circumstances might appear
 in proof to show the intention of the testator.

Where the words used are not tech-
 nical & no ambiguity on the face of the
 will yet if the state of the testator's property
 would not admit of such a disposition as

Wills

351

would appear from the terms used, circumstances may be let in to prove such inconsistency - See a good case in T. Brown Can. Case 472

~~See averments to prove~~

1st That the ~~are~~ ^{are admitted} ~~averments~~ where the meaning is equivocal - 2. Where from the will ~~only~~ it appears that only a life estate is intended, to prove that a fee simple was in fact meant - 3. To show the circumstances of a man's family as whether he has children or not, when the terms are "to him & his child" - 4. Where on the face of the will there arises no ambiguity, to prove that the circumstances of the Testator's ^{property} are inconsistent with the disposition &c. & 5. To rebut an Equity or an ^{or an exposition of law} implication of law which means the same thing - This last happens only where there is a difference between the regulations of Law & Chancery - At where ^{there is} no legacy to the Ex^r he will take the residuum, but if there is Chancery have determined that he shall not have the residuum ^{as a matter of course} ~~it is admitted~~ to rebut ^{construction of} ~~this equity~~ ^{in favor of the next of kin} & show that the Testator meant the Ex^r should take the residuum 2 Mr. 1201 -

If a man owed another a sum & gave him a legacy the law was formerly that the legacy should go to extinguish the debt - This Chancery

Wills
considered an implication of law - but proof
was admissible to show that the testator meant
otherwise - 2 Ld Ray? 1324 - 16ely 323

May not such cases come under the
head of Equivocal expressions? They might
with propriety, without recurring to the lump-
ing expressions of "rebutting an equity" &c
Lecture 40 July 18. 1794

Of Injuries to Real Property and their Remedies -

Of Trespass vi et armis vs. R. Prop^y

This is any invasion upon the prop^y
erty of a man. Leaves no person prop^y
fall under this subject.

The remedy is the action of vi et ar-
mis. ^{right to bring this action} This is founded upon the possession of
the prop^y. It is not necessary that he be the
actual owner. A Lessee or disseisor is ent-
tled to this action. Whoever brings such ac-
tion must either be owner of the prop^y or
have some color of ownership.

In Eng. to entitle a man to this action he
must have entered & thus be in actual poss-
ion of the land. Here no entry necessary -
as a man is in actual possession here as soon
as he has purchased an estate whether he has

if no person is in ^{possession} ~~possession~~ ^{possession} 360
entered or not. If the P^l has been dispossessed
he must have purged the dispossession by entry. & in
Corp. if a man has a right merely, as by de-
secent without entry he is not entitled to the
action. In person^{ship} the ^{law} ~~case~~ is different, ~~at~~
~~that is in Corp. as the same footing~~ From here
in Corp. the law is that whoever has a right to
possession ~~of the land~~ is consid^d as in actual possession.

It may be that the owner cannot have
this action as if he has leased or been dispossessed.
In case of a lease the owner is consid^d as a stran-
ger & should he enter an action of trespass
would lie against him. This rule will apply to
leases for life & for years but not perfectly
to a lease at will. In such case the owner
may enter when he pleases - yet if he injures
such property as the lessee has a right to, as em-
blements he is a trespasser ~~pro tanto~~.

When the intrusion is an injury to
the inheritance itself the Lessor is entitled to
this remedy & he has his election whether to
bring it against the lessee or trespasser. The
Lessor may bring the action if he pleases against
the trespasser, ^{on the ground of his liability for} ~~on the ground of his liability for~~
the Lessor & he that institutes his action first
out of the other two of actions. But the other

Injur. to Real Prop^y.

can in all instances bring the action where there has been no injury to the inheritance. The Lessee for life or years is never liable to this action, tho he may be in another kind of action as Waste. The tenant at will is however liable to this action for injuring the inheritance. - Co. Lit. 57. 1 Roll. 860 2 D^r 551 2

to displace may bring his action
against the Director for the act of displacement, but
not so frequent waste till he has regain-
ed possession. then he may maintain this ac-
tion for the whole time either against the
Director. Lope. mntee &c. but the authorities
on this point are contradictory - 2 Roll. 555
11 Feb. 51

10 May 31 If an man has sold his land on which there was a trespass, he may have his action against the trespasser even after the sale—

There, and is cultivated on shares the
same time, entitled to the ^{share} in ^{both} the copper &
has not ^{any} others in the name of the ~~owner~~
cultivator on shares, & has sustained them
in this country —

in the country —
 There is a collection of trees
 in the bay & the Lake on the right down & on
 all other sides the Lake may bring
 its action down to the level —

A man is liable for trespass by his cattle & the form of the action is that he entered with his cattle &c. If the fault was in the fence of the owner of the land the owner of the cattle may take them but if the fault was in his fence, by entering he subjects himself to another action of trespass.

A man may have a legal warrant to enter a house & he may in some cases enter without a legal warrant & not subject himself to this action. As if felony is about to be committed.

If one goes across land without the licence of the owner ^{& does damage} he is liable to this action.

Where a trespass is committed upon the land of the wife - if that prop^y alone is injured to which the husband has a right he need not join her in the action - but if the inheritance is affected he must be joined.

The master is liable for a trespass of his servant if done in the pursuit of the master's business, tho' without the ^{his} express ~~pr~~ ^{pr}active.

It is apprehended that the ~~servant~~ ^{pr} will yet decide that the servant must in all cases be joined with the master where the servant is not alone liable.

& Tender for an involuntary trespass
if a sufficient compensation in the form
of the C.T. is a good bar to an action —

Lecture 41 July 19. D. 1794 —

On the Connecticut Stat of Trespas as
altered from the Com Law

The action must be ^{founded} upon
the Stat. otherwise it will be presumed that
he takes his remedy at Com Law. This Stat
operates upon none but voluntary trespassers
in the Stat. If the action is not on the Statute
which gives 3 fold damages,
& there is not proof sufficient to convict a
man on that, yet the C.T. may give Com Law
damages ^{which are only single} ~~damages~~ without instituting a new Suit.

Courts have adopted this rule That where
there is a remedy both by Stat. & Com Law
if the action is founded on the Stat & there
is not proof sufficient to entitle the Plff to a
verdict on that, yet if he could recover any
thing at Com Law then will give that damage
to him without giving him the trouble of
bringing a new suit —

The Stat. has provided that if
there is any doubt of the Def's being guilty
the Plff may swear that he suspects him

& the Deft must then either swear that he did or did not ^{commit the trespass}. If that he did not he is clear unless the Pff has other proof besides his Jurisdiction - This is directly against the Principles of the Com Law & seems directly to hold out a premium to a man in this situation to commit perjury - The Pff in such case is not to be examined as to the ground of his Jurisdiction - If in an action of Trespas, the Deft claims to own the Land, the mode of proceeding is for the Deft to enter into a bond of 20L that he will pursue his plea to defend his title before the County Court or bring an action of ejectment against the Pff - The practice is for the record ^{of the Justice's Court} to be taken up to the County Ct & there the Deft may pursue his plea. The case then goes on just as it would before the Justice if he had power to try the title - This trial of title will be a bar to any action of Ejectment.

Of an officer's power to break doors.

The General rule is that if the offence is criminal the doors may be broken, but in Civil cases outer doors & windows cannot be lawfully broken down. The House however is an *Asylum* or Castle for no man but the owner of the house & his family.

Of Officers breaking Doors

If the outer door is entered peaceably all inner doors may be broken. The reason of this law is that in populous places, thieves might take advantage of a man's house being broken open & rob him of his goods, & frighten the family &c. See 1. Co. 91. Co. 91. Page 1. & Cro. Eliz. 908.

After the Officer has illegally broken in it has been a much litigated question whether a Levy is lawful for the above cases. It has been determined here & in Eng. that such Levy would be void & the Officer liable in trespass. But the reason & policy of this is very questionable for this is directly encouraging a violation of Law. There is a case where a man was arrested in presence of the Ct. which was a contempt of Ct. he being in their protection yet the Ct. said the Levy was good & the Officer liable for this contempt.

Lecture 42 July 21 1874

Of forcible Entry

Formerly if a man had a certain right to land he might enter & wrest it from an intruder by force. This practice so disturbed the peace of Society that Stat. were made to stop such violence. In present days it is to be used only where by neglecting to use it a man would lose his remedy.

As the Law now stands a man must not enter by force (by his own hand) nor with a number of persons with a view to take possession. It is equally criminal in this point of view whether the person thus entering is the actual owner or not.

The Rule is that no person shall enter with actual violence, nor with so many persons as to create terror - either of these would be a forcible entry. In both cases they must come with a design to enter & oust the present occupier. The offender is then liable to be indicted & punished. See Hawk. Pl. Cr.

Forcible Detainer

1st This is where one has made a forcible entry & detains forcibly - This is criminal whether he has title or not -

2. Where one has got possession with force & detains it with force against the true owner -

There may be a forcible detainer & forcible entry at the same moment. As where one detains forcibly, & the true owner is in possession unlawfully & the owner enters, & the intruder repels with force - It is criminal in both the owner & intruder -

Where the intruder is turned out by the forcible entry of the owner, & brings his suit against the owner for private damage, altho it was a crime in the owner, yet the intruder shall not recover damages for his ^{property} ~~his~~ not been injured - but it is a crime punishable by the public.

Forcible entry

yet in such cases the Law has furnished an eccentric remedy - he may complain to a Justice ^{the remedy is to be made by 18 freeholders} who may cause him to be repaid. Here the Question of title does not come up. The only fact to be enquired into is the forcible entry - The same in a forcible detainer; if ~~there~~ ^{there} was a forcible entry also. But if there was only a forcible detainer, the Ct. may punish, but not cause the other party to be seized.

Of Waste

All tenants for life whether conventional or by operation of Law are liable for waste & all other tenants for years &c. are liable for waste.

For the com. Law waste, single damages only could be recovered but by Stat. treble may be -

Waste may be committed in Houses, meadows & all other lands - Co. Lit. 53

If the house is suffered to lie uncovered an unreasonable time, it is waste in the tenant. If the property was in a ruinous state when taken it need not be kept any better 2 Roll 818.

It is waste for a man to extend a house & make it more valuable, to change rough land into meadow &c. 2 Roll. 815. Co. Lit. 53. 1 Mod. 142. 1 Mod. 94. A general rule it is waste

to alter the situation of the Grass - One exception to this rule is where pasture was improved into arable land - The judge observed it was ^{not} waste for this plain reason It made the land better - 2 Roll 314 -

Lecture 43 July 22^d 1794

Every thing that is consid^d waste, in Eng is not waste here - In this country wood is timbered out in such a manner as to injure the farm would be waste As the cutting down chestnut groves without leaving sufficient for fences &c - It is waste to open new mines, or dig gravel &c but not to improve old mines - Every mismanagement is not waste as to suffer meadows to be overflowed &c

Unless it is otherwise provided in the lease the tenant must repair houses, fences &c at his own expence He may however take timber for necessary repairs from the land Co. Lit. 53 -

If in the lease the timber is excepted he has no right to take even for necessary repairs but by taking it is guilty of trespass as any other person - If the term "without impeachment of waste" is used, the tenant is not liable for ordinary waste but he is liable for all wanton waste such as an owner would not commit -

In such cases Chancery will interfere & grant the Lessor a proper recompence, or grant an in

injunction to stay waste -

If the ~~lessee~~^{injury} is thro his the ten's own fault he can't take the timber to repair. Co. Lit.

54 — The immediate reversioner is the only person to bring the action of waste

An action lies against the ex^r for waste during his admⁿ tho not for that done in the life of the test. Eliz. 683-2 Roll. 828-

If the lessor brings his action against him who commits the waste, he can't bring his action against the Lessee, or an assignee of the term. - Tho he has his election which to sue - A tenant having land prized to him for a term to discharge a debt, is not liable to an action of waste, but must account for all damages, & the same principle is thought to extend to mortgages -

Eliz 777. Of Waste as in Chancery -

Where waste is committing we have seen Chancery will grant an injunction where an action of waste would lie & in many instances where this action would not lie - A Trustee who has at Law the inheritance may be restrained - & also a tenant in tail after possibility of issue extinct - This is where the waste is wanton & malicious. Whoever has an ^{even} contingent right in fee may obtain an injunction. Rep. 555-524-545

See 1 Wilm. 528. 3-4th 216. 2 Br. Car. 89
These authorities show the extent of the term
"with impeachment of waste"

Of Nuisances

For a public nuisance no action will
lie for the general inconvenience but if
any one has sustained any particular damage
he has his action. Public nuisances are
punishable by Stat.

For Private nuisances actions are not
in this subject see Black. Comment.
Actions may be perpetually tried & recovery
had till the nuisance is removed.

Building tan works & stables so as
to disturb or discommodate neighbors have been
here decided nuisances.

Lecture 44th July 23- 1794

Of the action of Ejectment

This is the only action now tried in
England for the trial of title to land.

At first it was only used to recover a
term for years but by a course of fictions
they have got to try the title. For the English
Law on this subject see 3. Woodeson 42 where it
is briefly & plainly laid down. or 3 Black. Comm.

Auth^{ies} Car. 492-12 Kay 2741 Comh. 217-2 Brn 669

Com. writ of ejectment

In our writs of Ejectment we have no limitation. It may here as in Eng. be used to recover a fee, a life or a year estate -

Our Law makes no difference between a right of title & a right of entry as in Eng. and whosoever has a title has of consequence the right of entry ~~and~~ is considered as actually possessed unless he is dispossessed & if dispossessed has the right of entry which taken away by Stat. the trespasser having remained in an undisturbed possession 15 years

This Stat. has been construed to take away the right of property as well as the right of entry - But Mr. Pease supposes this a false construction -

The P^r must state that he was in possession within 15 years last past. ^{or for a quiet possession} that he was dispossessed, & he must also describe the land - If judgment is in the P^r's favor, the Sheriff must evict whoever may be in possession & replace the P^r. An execution for mesne profits in such case cannot be had in this State for in the judgment, ^{damages} they take these into consideration. If the P^r dies after judgment but before execution the heir has his action for the Real Property & the Ex^r for damages -

1. Of Slander.

There are 2 kinds of Slander. One word

1. Where words are actionable in themselves
2. Where there is damage in consequence of words

Of the first kind ~~there are several~~
~~cases~~

In this kind of slander it is immaterial whether any particular injury follows in consequence of the words, but from the evil nature & tendency of the words themselves the presumption is that the person of whom they ^{were} spoken has received some injury. It must be stated in the declaration that they were falsely & maliciously spoken & if there was any damage it may be stated, tho' this need not be done.

Of this first kind of slander where the word must be actionable in themselves, there are several cases -

1. All words charging one with a crime which if true would subject him to corporal punishment are actionable -

as if he was charged with stealing the only question is whether stealing would subject to corporal punishment - if so then actionable. But if charged with being a liar - Will this subject to punishment? No then not actionable.

In Con. a man guilty of adultery is punishable & if charged with this he is entitled to his action. But in Eng. it is not punishable - consequently not actionable. In both Countries the same principles govern

2. Words which affect a man directly in his business are also actionable. As to charge a Physician of being a Quack but if of being a knave - no action lies - for those who employ Physicians do not enquire nor care whether a man is a knave - The only question ^{is} whether he is skillful - But if a Lawyer is charged with being a knave this affects him directly in his business & is therefore actionable.

If a Blacksmith is accused of shewing horses badly, he may have his action, but not if charged with being a knave or of making bad Saddles - for these do not affect him in his line of business -

3. Such as affect a man in his office ~~as if a just~~ with reference to him in his office - as if a Justice is accused of bribery or any thing said ^{of him} which affects his understanding or integrity with reference to any particular decision of his -

27th. There is one contradiction in the authorities. 1777. respecting the actionability of slanderous words against a man with reference to him in his office - yet the current 1800. authorities are that they are all actionable.

As where one is charged with a disease which ~~if true~~ would banish him from Society as Leprosy formerly &c

But it is not certain that the Off may recover by proving that these charges were made. It must appear that they were ^{they will be taken false unless the Off proves the} false or no recovery it had. It is necessary also that they be spoken with malice. This legal malice is not exactly the same with malice as commonly defined. In law it means any thing spoken from an unjustifiable, wicked, improper motive. So that if it turns out that the words were false, yet if the Off makes it appear that his motives were pure, there can be no recovery. If spoken thro carelessness the motive is not ^{legally} pure but it is illegal malice. — No causes have been decided against these principles —

With regard to trespass, sometimes a charge of this kind will furnish a ground for an action & sometimes not. This rule is drawn from the cases in the Books.

"Wherever the trespass with which he is charged would impair his reputation the words are actionable but if his reputation is not affected, not actionable —

As if one is charged with throwing ballast off New H. wharf — this would not impair his rep. & not actionable but otherwise if charged with stealing fruit.

Of the 2^d kind of Slander. VII. Where damages have been sustained in consequence of the charge —

^{The charge} They must be stated in the declⁿ to be false, & the damage must be stated. It is yet an unsettled question whether the words must be spoken maliciously. The current of authorities are that they must be maliciously spoken.

The Pl^f may be admitted to prove other words besides those stated in the declaration, unless these words are actionable in themselves as if one is charged ^{with} theft. The Pl^f may prove that the Pl^f has called him ~~a thief~~ but not ^{in the de} that he accused him of being guilty of perjury for he has a separate action for ~~but~~ the latter charge —

If the words are spoken in passion it is never a justification but where there was a just provocation damages will be mitigated. If there is no provocation the circumstance of their being spoken in anger will rather enhance ^{than} mitigate damage for the law, tho it casts a veil over the frailties, gives no quarter to the vices of mankind —

The manner in which the words are spoken is immaterial. They cannot be excused by being thrown into the form

of conjecture. & as some have supposed -

Words spoken of a man's evil inclination are not actionable. He must be charged with some vile act - Ant. 2-18-2 Will. 300
1 Rep. 18. 1 Str. 142 -

There is another rule - That if the words are spoken ever so maliciously, yet if the P^l can't be furnished no action lies. as if a man is charged with having killed his wife - But the wife was found to be alive - so that the man's character could not be injured & he could not be subjected to punishment. See

2 Durnf. 473

Lecture 46 - July 28. \$1794

When special dam is stated on the Deed^t it must be proved - To say of a Clergyman that he is an heretic is actionable when the only spec. dam. is the consequent Discredit -

In the case in Bro. Elix. 289. there was a charge against a man immediately affecting his business but no spec. dam. proved yet the action was sustained. Lack 628. 5 Le. 1070

Charges actionable in themselves & are so to be so when used in the legal course of proceedings. But if used before a Court not having cognizance it is no excuse - they are actionable. Quiz. 250 -

~~It is not~~ there is no such thing as joint Slander - each one must be taken separately -

Slandering words are not to be taken in the mildest or in the general sense but according to common acceptance -

Slander -

Pure Slander is not consid^d a crime here
or in England by com. law. But by our stat. it is -

Of Libels - or Written Slander

Whatever is Pure Slander would be
slander if reduced to writing & many
other words which wound the feelings, in-
flict the honor &c tho there would not be
slander unless written - Rep. 139. Hob. 215.

2 Will. 403. Whatever tends to disturb the
peace of a family is a libel 2 Burr. 980.

So far as the Libel respects the person
against whom it is written, the truth
of the charge is a justification. But it
is a crime against the public & punish-
able ^{whether true or false} - 5 Rep. 125. Some Libels are punisha-
ble, but not actionable as a Libel against
a dead person, or against government or
its administration Cowp. 6th 2 -

Publication of obscene books was con-
sid^d a libel 2 Str. 788. or against the estab-
lished religion 2 Str. 834 & 2 Burr. 196 -

An action was bro't in this state for
a publication against the Christian reli-
gion but the court would not permit it
to be litigated -

2d Mansfield determined that the
jury should only say whether the fact
of its being published is true or not & not
to tell what the law is arising upon the

by giving a general answer - Libel 378.
facts - He has been censured for this de-
cision, but Mr. Reeve thinks unjustly - for it
has been long a principle that the jury
are not to decide upon the Law unless
where the law is blended with the facts.

There are 3 defences to this action
1st A demurrer - where the deft acknowledges
the facts stated in the declaration, but denies
their actionability -
2. A special Plea in bar - where the facts
are admitted by the deft & he says the
charge was true, & in this state the truth is a justification
3. General issue - not guilty -

Under our Law we can prove the fact
when the general issue is plead. See our Stat.
Lecture 47. July 26. 1794

Of the pleadings in an action of Slander

First it is customary to state the ex-
cellence of the Plf's character - but this is
unnecessary -
2. That the deft spoke certain words "false,
figned & scandalous - The first of these dis-
"false" is an essential allegation - The decⁿ
would be ill with^t it - but the other two are
not essential - It ought always to appear
from the face of the decⁿ that the Plf is en-
titled to a recovery -

3. The words must be stated to have been spoken maliciously - This is also a material allegation -

4. That the words were spoken "in the hearing of divers citizens of this State"

5. If the words were spoken with reference to a precedent conversation & the words he or you are used - as ~~he~~ you are a perjured villain - or he a thief - It is common to include ~~him~~ within a parenthesis who ^{was} ~~on~~ ^{that} is meant - as he (meaning John Roe) is a villain a thief &c - This inuenendo is not to explain any term used, or extend its meaning beyond its natural import, but only show to whom or what they apply. ^{Rehearsal}

6. Then state the dam. either genl or specl as the case may require - If you state special dam - the story must be told accurately - If the Decr is for words affecting a man in his business, it must be stated that the Off was in such a trade -

Against a Magistrate it must be stated that the words were spoken with reference to him in his office.

7. If it was for a Libel, it must be stated that the words ~~se~~ were published of & concerning the Plff &c -

380.

Slander
Of the Defences

See page 378. for the General Defences —

1. That the words were spoken in the course of legal proceedings is a bar. Jac. 91.

5. ~~The~~ A recovery of damages in a former suit is a good bar — The circumstances must be related particularly, the record &c. &c.

6. Accord ~~&~~ satisfaction is a good plea

After accord the Plf need not accept but may go on with the suit. This appears unreasonable — It must ^{therefore} appear that there was an actual reception & the satisfaction must be valuable 2 Rep. 96.

7. The Stat. of Limitus is a good plea — The time in Eng. is 2 years & in Con. 3 years — The Stat. extends only to words actionable in themselves, not to actions for special damage.

8. A written Release —

9. An award It must be stated that there was a submission & award — It is no bar however unless the Dft has complied with it — If the award was to be performed before the action brot it must be so stated — If this plea is made after the award ~~is~~ ^{was} to be performed, the ~~more~~ award must have been complied with —

If there are 2 sets of award, one act^{ble} & the other not & the jury bring in a general ver

dict of "guilty" It may be arrested —
 1 Rep. 130 — See a case in Cowp. — In such
 case the Dft might demur to the part
 not as ~~the~~ & plead the gen. issue to the
~~act~~ ^{act} ~~the~~ part —

Lecture 48. July 28 1884 —

Of an action on the Dft for a malice
 in a suit.

It is a general rule, this action lies
 wherever the Dft in the original suit failed
 13. ~~to answer~~ ^{wherever} ~~that there are exceptions~~

1st of the Dft knew he had no ground
 when he took the original suit this action
 lies N. B. 260. 265

2. As he goes to us to hold the Dft to ^{answer} ~~answer~~
 since Bail. This action lies, in such ^{cases} ~~cases~~
 the Dft had a ground of action but the
 malice in using the Dft is a ground of
 action As if an attachment is issued for
 a vast deal more than is due to the Dft
 & Dft is unable to find bail for so large
 a sum 1 Sid. 424. 1 Sams. 228.

3. Where one sues another before a Court
 having no cognizance of the cause. It must
 appear that the Dft knew the Court had
 no cognizance. 3 Wils. 302

4. Where one fraudulently procures a
 judgment against another without giving
 notice. As if the Dft continues to have one of

Since leave a copy so as to deceive the Dft
that the Dft cannot see it & then procures
a judgment Went. \$0

5. If one sues with authority in my talk
name where I have good cause of action 14-

But it is apprehended that if this was done
from motives of friendship no action would
lie.

To commence this action untill
there is an end of the first claimed to be
malicious is premature, but it is not
necessary that there be a decision ⁱⁿ favor of
the Dft in the former action

There must be an actual damage mere
presumption will not entitle the Dft
to this action but the least damage will
suffice - & the actual dam. is not the rule
of damages

There is an imp^t question whe
ther arresting a man away from home in
a foreign State, is a good cause ^{for this} of action

As if one having a debt against another
in which he could recover in this State;

to ~~see~~ the Dft should take the oppor
tunity to sue him in another State. This
might put him to great inconvenience &
would furnish a ground for ^{this} action

This action is by our law denominated
a vexatious law suit to which no real dam
ages are recoverable

Of the action for a malicious
public Prosecution

It is necessary to this action that
there be malice & want of probable
cause. 4 Burr. 1794 1 Durnf 544

Altho the Prosecutor acts with malice
if there was a probable cause no action
lies - also if there was no probable cause
& the Prosecutor acted reasonably & hon-
estly no action lies -

The ~~Defts~~ acquittal in the former
case is prima facie evidence
that there was no probable cause, but
not conclusive. ^{it may be rebutted} ~~It is not the proof up~~
~~on the P^l to show that there was probable~~
~~cause & that he may be by a new proof in~~
~~the last action to show that he had prob-~~
~~able cause~~
If a Justice found sufficient cause
to bind the 1st Dft over it will generally
bind the P^l - 1 Will. 232 - 1 Durnf 493 -

The several kinds of grounds for
damages - 1st Where the Law presumes
damages. Here no damage need be
proved. 2. For any other offence by which
means he has suffered actual injury
to his reputation. 3. For the expense
as it is at in defending his reputation
2 H. 13/2 Br. 977

There is no necessity as formerly that the Df. should be acquitted. If there is an end of the suit any way, this action lies - Leoup. 205. 2 Burnp 225.

Any person who has aided in this prosecution is liable in this suit.

The defts direct references to this action can only be - A justification which is that there was probable cause, or no malice or a denial of the act by "not guilty".

In pleading the justification the Dft. plea must state that the crime charged ~~was~~ was committed, when & where - & his ~~ground~~ of suspicion Elix 34
Of the Evidence

When the Df. declares & states an acquittal, he must have a copy of the Record 19m. Bl. Rep. 385. The Df. may offer the evidence that was before given to shew the malice. The Dft may prove that the Df. was bound over & need not shew any other probable cause, unless the Df. proves direct malice that the Dft knew better, then the Dft may rebut such proof by shewing that there was probable cause. - Whether the jury can give in giving damages where several are joined, the author-ities are contradictory - If the ~~offence~~ offence charged is ~~no~~ no offence be binding over is nothing.

Lecture 49. July 29. 1794

Of Actions respecting Torts
Of Trover

This action lies in all cases where there is a wrongful taking or a wrongful use or a wrongful detainer of another man's goods.

1. If property is taken from me without my consent or knowledge this action lies & if it should be returned it does not wipe away the right of action. but may be a cause for mitigation of damages - Note This action does not lie for real property, nor certain kinds of personal or Chattels real, money.

2. He who comes by a thing rightfully but uses it in a way which he has no right to, is liable to this action. As where one finds goods & sells them, or where a bailee exceeds the bounds of the bailment.

3. Also where a man gets a thing rightfully, but exceeds the purpose of the bailment, but detains the property after a demand of the owner.

All cases that arise fall under these heads.

In the 3^d case a demand must be shown - In the other cases no need of any demand. But some have embraced the erroneous idea that there must be in the 2^d case - 1st Ed. 264. Elis. 495.

Trove

To lay a foundation for this action there must be a property of some kind in the ~~thg~~ ^{thg}. It is not necessary that he be the actual owner. He may be bailee &c.

There must also be a possession in the ~~thg~~ ^{thg} and a conversion.

In the 1st case the tort in taking was the conversion. In the 2^d The wrongful use is the conversion & In the 3^d The wrongful retention was the conversion. If there has been a demand & refusal the Law presumes a conversion, unless some circumstances appear that shew it not to have been the duty of the ~~thg~~ ^{thg} to deliver it to the person demanding. As if he had found a watch & a person should demand it of him the ~~thg~~ ^{thg} would not know whether he was the true owner or not & would be imprudent in surrendering it for if it should happen not to be his who demand, he would be liable to the true owner. If however he has satisfactory reasons that it is the true owner who demand, he ought to deliver it. If the owner describes the watch &c.

If the ~~thg~~ ^{thg} has a lien of any kind upon the property he may retain it notwithstanding the demand. 1 Burr. 423. 2 Ph. 752.

We are never to state a demand in the declaration. This being a matter of evidence & evidence is never to be stated —

Trouver
In all instances of tortious taking
Trove is concurrent with trespass ^{for} vi et
armis. But there was no action but
only a tort committed on the property.
Then trover never lies —

Suppose this tortious taking is at-
tended with a felony as for inst. ^{theft} —
Then trover is concurrent ^{in action} with theft.
If the Plt will waive the felony, he may
bring trover —

Suppose again one steals a horse
& sells him, The actions of Theft, Trover,
Trespass, & indeb. Assump. are concurrent.
This last will be commensurate with
what the horse was sold for — But this
would be lost only where the property
was sold for its full value —

2nd Case 1st Instance — Where the Plt came
by the property rightly trespass never lies
but indeb. Assump. 2nd inst. where the bailee
exceeds the bounds of the bailment —
~~action of trover lies~~ — indeb. Ass. will not
~~for trover is now merged~~ A special
action of trespass on the case lies — but
not the action of trespass —

3. Case In case of an unlawful detainer,
no action but trover lies — 1. Str 505.

If property is trovered from a
bailee — he or the bailor may bring
the action — If lost by the bailee he seems
to become answerable at all events, & he

388
whether he was so before or not. In this
subject the same rules obtain, as those
in case of waste committed under a lease.
If the Bailee brings the action, the Bailor
is estopped as to his action of trover,
but may bring his action of trespass
~~or of assumpsit~~ on the case against the
taker for special damages. 1 Lev. 282
2 Mod. 31.

The owner of trovered property
may have his action against any
person in whose hands the property may
fall, unless that person purchased it
in market overt, or public auction.
Otherwise, if the thief cannot be found
the person purchasing of him must
bear the loss. If however the article stolen
is among & in the hand of a bona fide
proprietor he owns it absolutely for obvi-
ous reasons.

By a judgment in this action the
property vests absolutely in the Plaintiff
the Plaintiff gets the value in damages un-
less the property has been returned
to the owner previous to the judgement,
in which case the Plaintiff recovers only
special damages - 3 Willon 336 - Or if the
property is sold it vests in the last bona
fide purchaser.

Trove has been maintained tho the conversion is not to the left use see a case in 3 Wils. 146.

This action has also been maintained for the whole, where there was only a partial conversion provided that was attended with circumstances of injury to the whole - see the liquor case in the 1. P. 576. - no person having a lien on goods can be subject to this action ~~trove~~ lies against the Master or servant who does the act in his masters business 1 Wils. 328.

Of tenants in Com. see Durnp^d 658. & Co. Lit. 200. Cowp. 445.

This action ~~trove~~ does not lie against the ex^r for the trover of the Testator But in deb. Assumps. lies for money had & rec'd - Cowp. 375.

Trove does not lie against a Com. Carrier if the article is stolen from, & taken in such way as he could not prevent - Talk 655. 5 Bur. 2827 -

Lecture 5th July 30. 1794

Declaration in Trove

It must be stated that the Pl^t lost the thing & that the Def found it & converted it to his use - The article must be properly described - A bond need not be exactly described as to sum ^{Ex. 262}

It must be stated that the goods were converted ^{within 3 years after loss} it is all that is necessary as to the conversion - Jac. 428.

It is usual to state the time when lost & where converted this is said to be also strictly necessary for the jury in Eng. is to come from the place where the conversion was. This however is all a mere fiction for if lost in Ireland it may be stated to have ^{been} converted in England &c. Salk 290. The action is transitory may be brought where the Deft, or where the Plt, lives. ~~See E. 10. 78~~ It is usual to state the value, but not necessary.

Of the Deft's plea

It is said this must be the general issue but there are exceptions. Holt says there might be a special plea in one instance Halm. 198. Jac. 73. ^{Mr. R. applied} ~~where the goods were converted~~ ^{where the goods were converted} a special plea good.

If the Deft. will come into Court, deliver up the article & pay costs he may stop the proceedings - Str. 142. & 2 Inst. Blackf. 902 -

Of Replevin

In Eng. there are 2 kinds
1st Where goods are taken for rent by distress - This is peculiar to England - unknown here

2. Where goods were taken damage done

In Con. we have also 2 kinds

1. Where goods are attached

2. The same as the 2^d in England

Where goods are attached the owner may get a bondsman, to give security that the goods shall be returned or the debt discharged - or either of these - The case goes to Court & is tried on the Replevin.

If the Plt in replevin is found to have nothing, he will be liberated with costs.

And if the Ct find that such Plt owes then under judgment in favor of the Dft. against the Plt & if the Plt fail the bond given is the security. ^{The Dft.}

in replevin may get the damages ^{done by the cattle} proved & if fairly prized, this is the rule of damages - If Cattle not commonable

get into my lot, I may have damages altho my fence be ever so poor.

But Cattle are commonable but horses are not. Hays may be made commonable by bye laws.

Replevin where goods are attached - I only getting a bondsman & taking back the goods.

Judgment goes against the original Dft, & if he does not pay the Replevin bond is tried - If a case is tried by a justice & the damages exceed his jurisdiction

replevin
he must diminish the cause.

392

Extent of a Bondsmen Liability

I have a debt of 100£ & attach 30£ worth of goods they are replevied by B. & I recover If my debtor fails. Ought B. to be liable for the whole debt of 100£ or only for the value of the goods he replevied?

There is no doubt but what in reason he ought ^{only for the value of the goods} but the law is doubtful in the opinion of some - the difficulty is raised by our Stat.

Lecture 51. July 31. 94

On the one hand our Stat. asserts that the Bondsmen shall be liable to the extent of the judgment and on the other there is no principle better established in the Com. Law, than that the Bondsmen need not indemnify the creditor in a good a situation as he was before the goods were given. The question is whether the Legislature contemplated this principle in the Com. Law & meant to note by it or whether this clause was thrown in needlessly not considering its consequence.

If Goods are pawned & money tendered to redeem & refused to receive then trover lies.

Actions of Trespass vi et armis

All direct injuries done to a man or person or to his personal property by another or his cattle come under this species of action.

The injury must be direct & immediate. If it is only a consequential injury the proper remedy is trespass on the case, & trespass vi et armis will not lie —

A man may become a trespasser ab initio even where he acted lawfully at first but afterwards committed a some illegal act — As for ins. If an officer comes into a house with a warrant to take a man & in doing this had to break in — per doors, tho his entry is lawful, yet if after entry he commits any unlawful act as beating the servants, the man's wife &c. he is a trespasser ab initio.

This however must be a misfeasance to render it a trespass vi et armis not a mere nonfeasance or neglect of duty as if one enters a tavern & calls for liquor or &c but will not pay — This is merely nonfeasance & this action does not lie — but if he had beat the family &c the action might have been brought —

This rule then is said to be an exception yet 4th. If a trespasser it not to be any exception — As where an officer by legal authority attached a man & committed him to prison but neglected to return his writ as was his duty for this an action of trespass vi et armis. And 5th. If it is that the action does not lie for his neglect of duty is not return

returning the writ but for the real act of imprisonment, because the officer can not prove that this was a legal act being the principal of the only evidence admitted in this case viz a copy from the Clerks records. It was never returned there & he can not introduce any other evidence of the legality of the act - In this ground therefore it is plainly no exception - See a Capital Case in 8. Rep. 146. Jac. 147. The Carpenter case.

Where the act is purely involuntary, ^{this action does not lie.} & perfectly accidental, ~~no action lies~~ - To elucidate this rule by examples -

One may be liable to this action notwithstanding the act was involuntary if there was any fault whether of malice or negligence. ~~But~~ If one act is ^{pur-}lawful which he is doing & he is guilty of a negligent or unlawful act he is liable - as where one out of malice shoots his neighbours horse & happens accidentally & involuntarily to shoot a man whom he did not foresee, ^{as a person} he is liable for both these acts - But if he was only shooting over the fence as another man would do, & happens to injure a person no action will lie. 4. Bur. 2092. Rep. 51. There was a case before the Superior Ct where a soldier in full arms & in full uniform injured him - tho no man to know of his negligence more than others, yet he was liable.

Tresp. vi et armis
 Of the Different ^{Causes} ~~of~~ of this action

1st It lies for threats if under such circumstances as would intimidate common men -

2. For an Assault. This independent of Battery is merely an attempt to strike, or threatening with some weapon.

3. Battery. This always includes an Assault. This is any violent, or indecent act. It is to be remarked there must be some act more provoking than a stare will not be sufficient, but there will be in aggravation of damages -

A Spitting in a man's face or throwing a stick so as to hit him is a Battery. See Buller's case Pierce v. Spence.
Justifications of Assault & Battery.

If an Officer cannot execute his duty without committing a Battery he is justified. But he must act reasonably.

A master is justified in correcting his servant, a Parent his child, and a Pedagogue, his scholar -

These are all justified, on the same grounds - If they exceed the bounds of moderation they subject themselves to

This action. The only difficulty is to determine what is a moderate chastisement. The true standard is this. They are to be their own judges, and when they do what would be an offence in a judge they are liable. If they whip immoderately with malice, they are always liable. But if they correct only moderately & then even so much malice they are not liable. If the flogging is ever so severe & it is manifest that they acted honestly, not maliciously, no action lies. The instrument & the manner are evidences of malice. (Remem. the ins. of the Schoolmaster whipping his scholar who dressed in women's clothes - &c. &c.)

The father may in certain cases correct his Prisoner, as if the Prisoner be insolent, distrust the family &c.

If a friend correct a madman he has never been justified.

When assaulted, B. then in the opposite party is justifiable, not on the ground of revenge but self defence. He must however go no farther than for purposes of self defence. One may defend by violence properly in his possession, but he must be careful to proceed no further than is necessary to preserve the goods.

Trespass vi et armis

May one take by violence his property from another? Yes if taken in fresh pursuit but not otherwise for he must not break the peace - Violence may be used to prevent the entry of a stranger into houses or upon land. or if he has got into possession by violence, in the same act the owner may turn him out but not if he has recovered peaceable possession - yet if he has recovered peaceable possession, the owner being in possession, he may be turned out by violence - as if while the owner was absent on a short visit & should come home & find a man & his family in his house, he might turn them out -

For the justifications of Father & Son when they find each other assaulted see an Essay on this subject -

In Eng. the defence must be special. but in Com. it may be given under the general issue

Lecture 52 - August 1st 94 -

It has been a question whether greater damages ought to be given, in a private action by the person injured, because the offence was high handed - W. R. is of opinion that however abominable & aggravated the trespass may be, the damages ought not to be enhanced, because it is a notorious violation

of the Law. for no man ought to be punished twice or double for the same act, & the public are abundantly able to take care of ~~themselves~~ ^{themselves} in an action for a breach of the peace.

In case of an A. & Battery the Plf's rank & litigation in life will be regarded as one rule of damage. It is not barely the pain of body that is to be taken into consideration, but of mind likewise for an insult to one man may be more to another.

Of False imprisonment.

Any unjust infringement of one's right of loco-motion, is false imprisonment & subjects the offender to an action of ^{Trespass} vi et armis.

The principal class of cases under this subject, is where men or Courts have mistaken their authority & gone beyond it. If a Judge issues a writ knowing it to be beyond his jurisdiction, he is liable. But if he signs the writ, as is common, without examining it, the Plf only, & not the Justice, is liable.

When the Sheriff is liable see Page under Evidence where this subject is taken up fully.

For damage done by Cattle &c there are

- 2 Remedies
1. The person suffering the injury may impound the Cattle - 2. Or he may have his action of trespass.

TRESPASS VI ET ARMIS

By impounding, he suspends his right to the action of trespass, but if the Cattle escape thro the negligence of the owner or the Pound Keeper, this action of trespass revives - yet if it was thro his own fault that they escaped, he loses his right to either remedy - Also if the Cattle die in the pound not thro the negligence of the impounder his action of trespass revives -

If an Agister, or one who takes cattle to keep, suffers them to get out & commit trespass, the person injured has his action against either the Agister or owner. If the agister had bad fence & judgment is obtained against the owner, he has his remedy against the agister for keeping bad fence - On the other hand, if the agister had good fence, but the Cattle were unruly, he has his action against the owner.

If a man keeps a fence, with animal, he is liable for all damages done by it - But with regard to tame animals the owner is not liable in the first instance unless they had been accustomed to misbehave & he was knowing it - Then he would be liable to the full extent. In the declarⁿ

Help. vi et se 400.
it must be stated, that the ~~owner~~ ^{animal} was
wont to do ~~the damage~~ just mischief &
that the owner knew of this.

Lecture 53. August 2^d 94

In the first of Mills. 155 see the
same case of Milkes where the whole
doctrine of

Search Warrants may
be found - no authority can be given
by magistrates, for rummaging a man's
house after stolen goods - This it has been
sometimes practised here, yet it is unan-
nounced by law - To justify this the Off must
1st make out - That he lost the goods &
that they were stolen -

2. That he vehemently suspects the
person who stole them to be J.S.

3. That he believes them to be in the
house where he is about to search -

The officer is to search only within the
place described by the oath -

Whoever takes out a search warrant
runs the risk of discovering the goods -
If they are not discovered, the whole trans-
action is a trespass - Where the property
is claimed by the owner of the house -

Preps. vi et armis
where found, the officer should keep
it in trust & not deliver it over till
the right of property is tried.

Shall a non sane man be pun-
ished for an assault & battery? NO—
not by the Public; but it is reasona-
ble that, in a private action, the party
injured should recover damages
See Hob. 134

A Ministerial officer is always lia-
ble for what he does his mistakes. But
if he is only aiding to the wrong act
he is not liable. As if a Judicial officer
commands him to attack a man, let the
attack be ever so unreasonable & un-
just yet if it is within the Judicial offi-
cer's jurisdiction, the ministerial officer
must obey. But the Plf or the Jud. Officer
is liable & not the ministerial officer—

A Judicial Officer is never lia-
ble for mistakes made in cases over
which he has jurisdiction, unless they were
manifestly this malice—yet if he presumes
to act where he has no jurisdiction he
subjects himself to an action. Cowp. 476.
Str. 851. [4 Rep. 62 This last is the case of a
Ld. cutting wood ^{flows} where trespass is

armis lies, cutting the wood &c

One ten. in common cannot bring trespass against another any more than he could trover, unless the article be totally destroyed.

2 J. Black. 8 Q. 2. the Squid case where a man injured by the 2^d throw of a Squid can maintain trespass against the 1st thrower. He could. W. R. supposes justly.

See Jac. 36th for curiosity only, about striking one in a Church Yard.

Ex. 8. Admt. as Just cannot be arrested. It is false imprisonment to arrest them. 2 J. Black. 119. Same case supported in Willson, ~~the same~~.

An arrest on Sunday is false imprisonment. Doug. 0. 46

In trespass all are principals. A man stands by under such circumstances that he might have prevented the trespass he is a principal.

The action is joint & several. The action may be brought against one or all. And when the action is against all, the Def. may get the whole out of any one & he cannot sue the others for their shares.

A release to one is a release to all. One of the trespassers may be made up. It is a witness against the rest. This is an over-

tion to the general rule of admission of testimony, but it is a case of necessity.

A judgment against one offender is a defence for the rest.

The Dfts may defend jointly & if the jury find ^{them all} guilty they must not sever the damages ^{if they do sever} - all must be equally liable —

Lecture 54. Aug 7th 1794 —

Where the general issue is pleaded the jury may find a part guilty & a part not tho they cannot when they all join in a justification —

If a judgment is reversed neither the Df nor officer is liable for their conduct under a former judgment. Formerly in such case the Dft could sue the officer in an action of trespass vi et armis & the Off in trover — Will. 555. If the officer had raised the money from the Dft & there had afterwards been a reversal of the judgment the Df may recover back the money by an action of indebit. Ass.

The officer always takes property at his peril i.e. if the property does not happen to be the persons against whom the Benⁿ has gone out, the officer is liable to the owner in an action of trespass.

verba est et armis 401.
But in case of Replevin the officer is
never liable for them the particular property
is specified in the warrant—

Mode of the Df's declⁿ in
Assault & Battery—

If the Df means to deny the fact
that he assaulted, or gave occasion to the
Battery, he replies that the Battery was thro
the Df's own wrong, without any such
cause as is alleged by the P^r. But if
he means to acknowledge he must re-
ply specially & state a disproportionate
battery by the Df— or rather the case must
be stated as that it may appear to be
disproportionate—

That the Df first assaulted is prima
facie a good plea—but this sentence may be
removed by denying the fact or acknowledging it
& proving a disproportionate battery

There is no need of alleging the time
when, if it appears from the date to be
within 3 years & if he has stated one time
he may prove another.

of the mode of pleading a Licence, a release or judgment

The 8th in C. T. defends &c because he says
altho' he did come & cut the trees in, yet he had li-
cence from the Off. to cut at such a time
& that the Off. ought to be barred abryue
hac he committed a trespass before or after
such time — In this case he must cover
all the time before & after the licence —
In case of a release he must cover all
the time after the release ^{only} for that
covers all the time before — & In case
of a purchase & judgment he must
cover all the time before the purchase
for his trespass before the purchase ~~is~~
is not merged in the purchase. he is as
much liable as any other person —

Action of Trespass on the case

1. This is maintainable whenever
one sustains an injury in consequence
of a lawful act &c. 344. as where
one draws a spout & the water run
into his neighbours cellar —

2. From an unlawful act &c. 345
as if one throws a log into the high-
way & another tumbles over it on
the night —

3. Where the injury does not arise from any positive act, but from neglect of duty -

It is said that where a man finds a thing & suffers it to spoil this carelessness he ought not to be liable - but it would appear that he ought if no care was taken to preserve it. ^{Lo had} ~~he left it~~ another man more careful ^{might have} found it & the owner would then have received it found. ~~But~~ There is no question but that if he had not taken it into his care, he would not have been liable, but if a man will undertake to keep a thing in trust he ought to be liable for any damage - as if he was a bailee -

It makes no odds about the intention of the person injuring; ~~for~~ if the thing is damaged in consequence of his neglect he is liable whether intentionally done or not - 2 Lev. 172 & 196. - True he need not be perfectly careful - but if so negligent that a common man would not have suffered the thing to damage, then liable -

Off the act is a public damage the action must be lost by them, & no private ^{action} can be lost, till some private injury is sustained Salk 12

An employer is liable for damage done by his servant as if the person employed went his cart against another's carelessly &c the Master is liable 2 Str. 1204.

(Several of those cases mentioned under the head of trespass vi et armis ought to be ranked under this head as in case of injuries done by ^{one's} animals to another's property or person by biting, goring &c 2 Str. 1204.)

1. Of injuries done to one's person in important cases, it is where a ^{man's} body is injured by a regular Physician or Surgeon - In all such cases this action lies - but if done by a quack doctor then no action, for it was the essence of folly to employ him. ^{the case of the} Ld Ray 2 Ld. This was where a regular Physician injured a man by attempting a new experiment. This ought to have ^{been} an action of Ass. & Battery -

2. & where persons are injured by corrupt liquors &c &c. &c. &c. there is liable 1 Hall 90. Car. 510.

3. This action also lies for beating a man's servant, or child - also where one's wife is beat. Both husband & wife have their actions. See per quod consortium

rest on the case

108.

amist. & she with him for the battery.

~~But the~~ ~~author~~ ~~of~~ ~~this~~ ~~class~~ ~~of~~ ~~cases~~ ~~the~~
ranked by authors under *trist. vi et armis*
W. R. thinks they ought properly to be un-
der this head.

The father also brings this action
per quod servitium. Amist for debauch-
ing his daughter & special damages are
recovered altho the recovery is entirely
on another ground. The loss of ser-
vice is ~~not~~ the smallest ingredient in
raising the damages. ~~The damages~~ for
where the daughter was before a lewd
woman, no recovery is had, & yet in
either case there is equal loss of service.

The true ground, is the injury to the
feelings of the parent & consequent disgrace.

No one but the father or mother
can bring this action, & it makes no
difference whether the daughter is of age
or not, if she is in the service of her pa-
rent so much as to milk a cow (says ² Mansfield)
the parent has the action — 2 Durnf.

Perhaps on the case
 of the liability of Sheriffs for their
 under officers' wrongs

The Sheriff is liable civiliter, not
 criminaliter for all the torts of his under
 officers whilst in the execution of his
 business. Salk 16.

Formerly Sheriffs were not liable &
 the greatest villains then ^{filled} their
 offices - but since they have become lia-
 ble it is easy to see that they must be
 more careful to appoint faithful officers.

Where the action is for neglect of the
 under officer, the Sheriff alone is liable
 to the person injured & the under Sheriff to
 him.

There most capital class of ca-
 ses under this subject is ~~that~~ where
 the officer suffers the Prisoner to escape.

It is a rule of Law that whenever
 the damages can be ascertained an action
 of debt will lie. On this principle this actⁿ
 also lies against the Sheriff for suffering
 an escape ^{or Execⁿ} but not on mere process -

To constitute an escape there
 must have been an actual arrest or that
 which amounts to this. An actual arrest
 is where there is a real touching

A constructive arrest is where there
 is no touching, but the officer reads the
 warrant & the Prisoner goes with the officer.

411.

Trespass in the case
& thus implicitly acknowledges himself
his Prisoner. This depends altogether upon
the fact itself on of the Prisoner. For if he re-
fuses to be taken & runs off, it is no ar-
rest Corp. O.

Assistants to the officer may arrest
if in his company so be in his company
they need not be in the officers sight. but
may be distant from the officer however
must be out on the business -

If the Prisoner escapes, then the Sheriff
becomes liable. The doctrine of escapes
consists of positive rules & it is not to be
enquired what is reasonable? For these
rules are fully established as law

1st Anciently By the Com. Law the Sheriff
who suffered an ^{criminal} escape was to stand in
the Prisoners place & suffers like a felon
punishment he was to suffer ^{the crime being first committed}

2 In the ^{13 year of the} reign of Edward the 1st an act
of debt was allowed ^{the wardens of the Fleet} by Stat. Westm. & C^{ts}
being sensible of the cruelty & injustice
of the Com. Law extended the equity of
this Stat. to all other cases ^{of this kind} ~~then England~~

3. ~~A contrary & an half after this act~~
~~it did not bar an action of Tresp. on the~~
~~The act in the case was made by Stat. the same reign of~~
13. Edw. but not applied to the Sheriff till 15.0 after

418
The last decision was that the county is liable only for nominal damages
case was adopted by the Ct. See the
1st volume of the Lectures for the whole
subject & Reece's Hist. Eng. Law
Lecture 36. Aug. p. 1194.

Hesph. on care

case was adopted by the Ct. See the
1st volume of the Lectures for the whole
subject & Reece's Hist. Eng. Law
Lecture 36. Aug. p. 1194.

Where the Prisoner escaped thro the
neglect of the Jailor or the insufficiency
of the jail &c & the Cr brings this action
it is a litigated & unsettled question
whether judgment must be rendered for
the whole amount of the executions
or for damages at the pleasure of the
Ct. Our Sup. Ct & the Ct of Errors
have each decided different ways
at different times, so that the doc-
trine is yet open to litigation. MR
thinks there is no doubt but the firm
in the exⁿ ought to be the rule of dam-
ages. When the Ct decided against
this opinion, they went on the ground
that it is the very nature of an action
in the case, that the damages should
be uncertain & the Plf must run his
risk of recovering more or less than
he cov^d. MR says that this rule has

would keep inviolable Mr. R. says that in an action on the case the damages are frequently ascertained as where debt & case are concurrent ~~in all such cases~~ he supposes that in many such cases the damages are completely ascertained & that ^{neither} the jury, nor the Ct can vary them - The Eng. Law & Com. differ respecting an escape on ex^{te} in one particular - Where the officer releases the prisoner the Sheriff is liable immediately in Eng. But here the Prisoner may come & surrender himself within 60 days after the ex^{te} issues & it is as well as if he had been kept in Prison, & the Sheriff is not liable till after the 60 days - for no body knows but the Prisoner will surrender himself in that time - But if the Prisoner has been in jail & escapes any way the Sheriff is liable immediately.

If the process is void the Sheriff is excused as where judgment was obtained fraudulently
 273. Carth. 148.

Warrant in the case

The Sheriff may sue the bondsmen
before he is sued by the Creditor. See
Eliz. 53 where more liability is settled
to be a ground of action. ^{This is fully settled as to Sheriff}

If the debtor was a Bankrupt when
taken & escapes, in Eng. his bondsman
is liable altho his body could put the
creditor in no better situation. But
our Cts have adopted a more equita-
ble principle that if the creditor
has not been injured by the escape, the
bondsmen shall not be liable ^{see Kirby's Rep.} to the
~~extent of the debt~~ 2 Wil. 325. 4 Burr. 2060

We talk also where an attorney is liable
if he neglects to have the writ signed &
issued. Also a Justice must sign if of-
ficed & if any damage in consequence
of his neglect, then liable so of all
other ministerial officers—

Where the naked Bailor is liable
to this action. See 2 Str. 1099. 2 Ld. 903—

This action lies against a Comm. Carrier.
He is liable when the goods were lost
any other way except by the act of God,

neglect on the case 414
or by the open enemies of the land 2 L Ray 90.
2nd Mr. 128. Where it is owing to the act of
God alone, then clearly ^{not} liable. But where
negligence is united with this, where it ap-
pears that the Carrier was to blame then
he becomes liable 1 Burnford 27. This
case says, the Carrier must not be any way
to blame. 1 Vent. 109. 1 Burnf. 33.

To make him liable the things must
have been committed to his sole care.

If the owner is to blame, the Carrier
is not liable as if he deceives the Carrier
by ~~telling him~~ ^{making him believe} the goods were under
their real value - 1 Mr. 145. Carth. 485

4 Burr. 2278. 2 Talk 640. 5 Burr. 2611

3 Wills. 429. 443. about Letters in a post office.

The Consignor or Consignee may bring
the action against the Thief who steals the
good & 5. Burr. 2680.

Coachmen are not consid^d Comm. Car.

Postmasters not liable for the robbery
of their under officers. Cowp. 734.
Rule in pleading. If either party states necessary
he must leave it open for the other party to traverse.
remember this

Lecture 57th August R. 1794

The pawnee is liable, if he uses the pawn negligently, as he would not do it own, to this action.

He is liable at all events, Goddard not except after tender, & refusal on his part.

It is a general rule that the pawnee must not use the thing pawned. But there are exceptions. As where the thing is not the worse for using as a jewel for inst. - or where it is a charge to keep as a horse. If however the jewel is stolen in use, the pawnee loses. but if the horse is stolen the pawnee is not liable. 2 Salk. 522.

This action lies whenever any thing is abused by the bailee, or where it is applied differently from the design of the bailment.

Where the purposes of the bailment are exceeded, & damage is done accident upon the bailee is almost universally liable. As if a horse should be stolen, ^{when} out of the bounds of the bailment. But there

Resp. on the case 410
may be instances where it might be litigated
as where the horse died with some disease
which he evidently would have died of had
he not been out of the pound.

Tavern Keepers are liable to this
action, like Common Carriers & like them
have a lien, till paid their fees. It must
be a traveller, & this traveller must have
entered himself as a guest, to make the
Tavern Keeper liable - Calver's case 8 Rep. 22 or 322
Moore 18. Selw. 622.

This action also lies for all deceit
for this subject see Lectures 1. Volume.

Lecture 38. August 19th 1794. --

Where one sells an article knowing
himself not to be the owner, he is liable
to this action. If he was ignorant of the
fact, ^{of ownership} indel. assump. for money had & recd. lies.
If any fraud in the transaction special dam-
ages are given in an action on the case, but
not in indel. ass. - Cro. Jac. 474. 10 R. 593 talk 216

The 2 last go on the ground of ^{science} ignorance of his
not being owner. If it was a bargain of bargain
neither of these actions lie, if the purchaser
knows of the defects of quality or title.

The rules then are these 1.

1. If one sells an article to which he has no title, being ignorant of this, an action for money had &c lies—
2. Where he sells the article knowing that he has no title an action on the case for fraud lies—
3. Where he has the title, but there is some defect of which he was ignorant, no action lies—

Where a person obtains property out of the hands of another by deceit—as where one goes under pretence of being commanded or requested by a creditor to take up money from a debtor & appropriates this money to his own use, he is liable in this action.

Moore 589—

Where a man sells an horse &c in his possession he is not liable tho' he has no title Salk 213—Jac. 196—

By the Eng. Law an inf^r is liable criminally, tho not civilly for fraud—

A Tame covert not liable for Larceny.

1. Where one Merchant lends to another who owed him to the amount of insurance money, to insure goods, vessels &c, & he refused. He is liable to this action on the case 2 Ann 187—
2. Where Merch^{ts} have frequently insured for each other one refusing upon the request of the

other is liable also to this action —

3. Where one sends bills of lading to a foreign merchant with a request to consign the same & insure back; if this merchant accepts the bills & consignee ship, but fails to insure he is liable —

Of the action on the case for Adultery —

This is generally lost as an act of trespass vi et de — yet it is an act on the case. & Mr. Reeve says the word assault vi et de are entirely needless —

The 3 grounds of Damages are

1. The injury to the feelings of the husband —
2. The alienation of the wife's affections —
3. The imposing upon the husband a spurious offspring.

It is settled that if these 3 grounds of damages can be proved no justification can be made by the old authorities, but lately a different opinion has prevailed — At least it is agreed that circumstances may be admitted to mitigate damages — as 1. an actual or implied consent of the husband. 2. no imposition of a spurious offspring. 3. The lowliness of the wife's character, & where her character is put in issue by the pleading, the defendant may prove particular facts to criminate her character —

Tresp. on the Case

Damages are enhanced by the former happiness of the couple, the good character of the wife previous - any peculiar obligation the D^t was under to the P^l - the D^t being a man of great property - and the high rank of the husband & his wife -

Lecture 59th Aug. 12 - 94

In the Act for adultery the incontinency of the husband is a ground for extenuating damages, his brutality, - their former unhappiness, - Principles relating to a rescue

The Sheriff may bring an action on the case, or trespass or other against the rescuer - By the Eng. Law the return of the P^l (that the Prisoner was rescued) is complete ^{against the Sheriff} evidence in a criminal process, but in a civil may be rebutted -

In the declaration the original cause of action, the breach, the arrest & the rescue by the D^t must be stated - The manner of the rescue is immaterial - When the Sheriff sues in this action, the damages recovered are always the amount of the demand against the Prisoner, & the same in the case if the creditor sues instead of the Sheriff provided the Prisoner was taken in execution, or on mesne process if a

Bankrupt. On case. 420
writings from the necessity of the case, altho
he is interested to charge the rescuers for
them he is exonerated. An escape is also
a good writing to charge the Sheriff, tho
interested when the escape is voluntary.
We have a flat compelling officers to
do their duty, which besides the com. Law
remedy inflicts a fine for not return-
ing writs, but to subject the officer the ac-
tion must be on the flat. & not merely
an act on com. Law on the receipt. and it
seems by a determination of the Sup. Ct
that the flat extends only to misbehavior
with a writ on mand. process. Is this the
true meaning of the flat?

An officer is obliged to serve a
writ if his fees be not ^{tengered} offered him.

An act on case lies for enticing
away one's wife, tho there is no charge of
crime com. but if there be sufficient cause
of which the Ct are judges, no act. lies.

This act. lies for enticing away
a servant 2 Lev. 68. Comp. 54. A journey-
man is a servant of this kind - 3^d Barn. 1342.
This act. lies for refusing a ^{to have the writs} writ at an
election. 1 Vent. 25. Also for a voter if he is re-
fused his privilege talk. 19. ~~502~~ ⁵⁰² ~~unlawful~~ ^{unlawful}

121) Heb. In Care, - Assumpsit

In an action in which an under-
alien concerned matters which would
be found^{at} for an action on the case
may be given in evidence to entice
the damages - ^{When sent with to testify for Master Lee 28th}
^{he 11th 1844 10838}

Director for a warrant on the
escape

State an original writ before a
competent jurisdiction. The judgment
rendered by the Ct. specifying the sum, &
that an writ issued upon the judgment, that
it was delivered to an officer, naming
him, properly qualified, that he did ar-
rest the Dft on the writ & that afterwards
he suffered him to escape. Or if it be
the gaoler who is sued, state the commit-
ment to him by the officer & that he
suffered him to escape out of goal. It
is unnecessary to state whether the escape
was negligent or voluntary, for that
will come properly in the replication.

Lecture 80, Aug 13th 94

The Lowest kind of contract is Parol -
these are either express or implied.
The technical term for these actions is

(Assumpsit)

An express assumpsit is where the parties
enter into a particular agreement as to build a house
or

non assumpsit is the plea

Implied assumpsit is where the law implies a promise from certain circumstances. These circumstances must be such that when taken together it appears that one man ought in good conscience to pay another a sum of money.

An implied assumpsit will lie wherever an express will except where damages are in their own nature presumptive here the express assumpsit must be first founded on the contract —

1. In all cases where the sum in damages is certain debt & indeb. are concurrent.

2. This act lies where goods are sold & no price agreed upon, & is concurrent with ^{last} book debt, & an act of debt — for a quantum vale

3. Where one labours for another & the wages are not agreed upon — Here indeb. lies for a quantum meruit & book debt & debt also lie — it being capable of being reducing it to a certain as the market price is fixed —

4. Upon an internal computation where the parties have accounted & a balance is found indeb. is concurrent with this act —

5. For money loaned Debt is concurrent. & if a promise to pay special ass. lies —

6. For money laid out by request.
The case is the same as to Debt & Spec. Ass.

7. For money laid out without any request as to sup. the Off's family in his absence &c

8. For money had & rec'd to the Off's use - This may happen different ways. In short whenever one has in his hand another's money which he can't in justice retain, his action lies - & this whether there be any contract between the parties or not 2 Bur. 1010 - As where one pays money by mistake ^{Talk 28} where it is taken by fraud, where a man finds another's money, or refused to redeliver money delivered to him. Trover is also concurrent in these cases.

This also lies to recover back money paid on a judgment of Ct when circumstances ^{subsequent to the judgment} frame it up, plainly showing that the money cannot in good conscience be retained, & which if they had appeared before trial there would have been no cause of action - as after a recovery upon a policy of insurance upon a vessel supposed to be lost the vessel should return - But never for a mere erroneous judgment.

Where there was a just debt but

The security for it was illegal & void, as if
gotten by duress & upon the avoiding of the
security indel. ass. lies for the money due on
the contract - 1 Burr 732.

When money is extorted from another
as by taking an undue advantage of his
situation, or in any other oppressive manner
this act lies. 1 Doug. 672 Bromley & Smith
But where the parties are equally in
fault no relief is granted.

Aug. 14th Lect. 61. - 94

Upon the Stat. of frauds See page 35
Aug. 15. Lecture 62 - 94 -

Assumps. lies not only upon parol
contracts but also upon such written
contracts as are not specialties, which are
such as do not detail the consideration
at length but simply express "for val. recd".
Of this kind are receipts in this country.
In such cases the act. of book-debt is u-
sually brot - which is a species of ass. & the
receipt given in evidence.

It is doubtful whether an act.
may be sustained on a receipt of more
than 6 years standing that being the limit
of book-debt action. Some determination of
our Sup. Ct seems to favor the idea that
such an action might be sustained -

It is common especially in important bargains for the buyer to make a deposit of some money as a security for the bargain - In fact if the vendor refuse to deliver the articles the vendee may have trover, or assump. to recover back the money. Or if the vendee will not complete the purchase, the vendor may either affirm the bargain & sue in assump. for the remainder of the purchase-money, or he may let the matter rest & keep the deposit which is a forfeiture in law & equity 1 B.M. 745.

At a vendue when the article is struck off to the bidder the bargain is closed, but if the purchaser does not pay down the price, unless an agreement to the contrary, the vendue master may resell - He is obliged to strike off to the highest bidder & cannot adjourn the vendue till he has without being liable in an action to the owner ever so small - He must not employ one to bid for him, or the owner of the goods to prevent their going to the highest fair bidder, & tho he does strike off the article to the such employed bidder the property belongs to the highest fair bidder - Corp. 395

Wagers in Eng. are recoverable at law, except where they are cut off by stat. — but the Cts. suffer recoveries rather on account of former precedents than because such a practice is consistent with principle — There has been no decision on this subject in this country but it is apprehended our Cts. would adhere to principle notwithstanding the precedents —

The requisites to make a wager binding in Eng. are, 1. The event must be contingent, & unknown to the parties 5 Burr. 2803 Cowp. 872 It must be of such a matter as will not give occasion to the introduction of indecent evidence, or injure the feelings or reputation of a 3^d person Cowp. 729. 3. No wager will be good, made use of to cover an illegal transaction, or 4 is in its immediate effect. contrary to public policy — Summ^{er} 56. — Wagers are never considered in the light of a debt contracted & neither debt nor indel. will lie — a special assump. is the only action.

Lecture 63. Aug. 16. 94

Assumpsit will not lie to recover back a voluntary covenant so done for the advantage of the person & with an expectation of a reward, but if the person be fitted to promise to pay if he is bound to do it such cases are to be distinguished from those where money is demanded by agreement &c. &c. —

In *Allen* a promise to pay so much money, that soon is the rule of damages. However if there was an express promise for a certain sum, but the jury are at liberty to determine what in equity is due, yet there is one exception to the rule — "That where there was a promise to pay a sum of money, the recovery is to be accordingly" — where the promisor was entrapped not knowing the extent of his promise — the barley-corn case for example —

When the contract is illegal the contract is void, & if it is stated in the declaration, as it must be in assumpsit that

^{offer up}
 The consid^r giving the equitable claim
 might be pleaded, demur to the dec-
 laration & if it is in a Specialty & con-
 tained in the condition pray over,
 recite the condition & then demur.
 But if there be no condition but mere
 "for value rec'd" plead the illegal consid^r
 in bar & substantiate this plea by parol
 testimony - for there is no obligation how-
 ever solemn if given for an illegal
 consideration, but what the consid^r may
 be gone into for the purpose of vacating
 the contract for any degree of illegality
 vitiates the writing. ^{& contradicts} - Elm 199 -

Money won at Play & lost hard
 can't be recovered. & if paid can't be
 recovered back at Com. Law. Tho by Stat
 of Ann it may for in all cases where
 the parties are in pari delicto the Law
 leaves them where it found them

If A promise B. 10£ to beat C. & he
 does it, he cannot recover it, & if A has paid
 it he cannot recover it back. yet if one
 of the parties come into Ct upon the ground
 of rescinding the contract, he may recover

429. ^{& Comp. 79.3} back his money - as if B does not
beat C. accord to agreement. A may re-
cover back the money - Evidently
bad policy - It encourages B. to assault
C. for if he don't he loses his cash.
Doug. 453. Ray 89 -

Where one by deception gets ano-
ther to do an illegal act unknowingly
towards a 3^d person, as to imprison
him & the like, & the person imposed
on is sued & damages recovered of him
for that mistaken act, he may recover
against the person deceiving him ^{that is}.
If one promise another a reward
to do what the law obliges him to do
as to an officer to serve a writ, the
promise is void & no recovery can
be had ^{But} 924

The Case in Comp. 79.3 seems
to have established a rule that in ^{an} ~~aff~~
which is in its nature an equitable ac-
tion, a Pl^{ff} can never enforce ~~an~~ un-
conscionable demand

Where there is no consid^r at all
or a trivial one, no recovery can
be had - What is meant by a ^{trivial} ~~trivial~~
consid^r is not that it is inadequate

Spencer's
but one that may be removed at 43.
the instant the promisor will to deny it.
As if the consid^r be to make an estate of will.
It is determinable instantaneously &
consequently is no consid^r—

When the consid^r of the promise was
past, the law anciently was that no en-
gagement to pay was binding; that is, it
was no legal consid^r unless there was
some kind of previous request. But
the Law now is that if the act done
was beneficial in any way to the promisee
it is a sufficient consid^r for a future promise
to pay it, but if not beneficial, it would
not unless there was some kind of previous
request. *Aut. & 4. Calir. 282.*

If one being indebted to another
promise him that in consid^r he would
not sue him by just a time, this being
specified, (for otherwise it would be of no
force) he would give him just a sum,
it is recoverable. If A. owe B. 90^l
or note for any price & afterward for
the same thing promise to give him
more the promise, that a sum being

Assumpsit

equitable may waive the rule &
 sue in ass^t the new promise & recover
 is notwithstanding the gen. rule^d That
 you can't sue upon a Parol
 contract, — when you have authority
 of a higher nature —

The Stat. Hen: 8 requires no particular solemnities to Wills & consequently none were required to revoke ^{on the} leading principle that a subsequent ~~instrument~~ ^{contract} may destroy a former one of the same nature. Accordingly a variety of cases arose where no solemnities were required to revoke a Will. But afterwards the Stat. 29. Car. made certain solemnities requisite both to make & revoke a will - so that many things which before would revoke were cut up by the roots by the Stat. of Car. But since this Stat. it has been adjudged in a number of cases (for which see Powl on Devises) that this Stat. referred to express Revocations & left implied revocations as at Com. law. Our Stat. has adopted the first part of the Stat. of Car. respecting the making of Wills & has left out that clause relating to Revocations so that it would seem that our Stat. has left the doctrine of Revocations as at Com. law. Tho it is strange that the Legislature should break in upon that universal principle running thro all contracts "That no contract of a higher nature shall be avoided by one of an inferior nature;" —

On the footing of reason & common sense a will ~~attended with~~ made with great deliberation & attended with special solemnities ought not to be revoked but by an instrument made & attended with the same deliberation & solemnities unless indeed in those cases of cases under the head of implied Revocations.

The writ of Mandamus lies to restore
persons to offices, to compel corporations to
elect officers & to compel Officers to execute
their respective duties. ^{See} As if a Register ^{refuses} to re-
cord Deeds this writ lies to oblige him to do
his duty ~~See~~ See Esp. & Kirby's Rep. where
it is settled that it lies in this Country —

It is a settled rule in the Sup. Court that
witnesses may testify what a Party in the
suit said against himself, but not what
he said in favor of himself unless it was
in the same conversation in which he spoke
as to himself. — remember,

It is also a settled rule in Sup^{ts} that

An Essay on Descents
 by Tapping Reece Esquire.

The Stat. of Descents both of Real and personal property is manifestly derived to us from the Eng. Stat. of Charles 2^d respecting Teston Estate. So far as it respects the distribution of estates among the lineal descendants of the intestate it is in terms the same with these differences. The Stat. of Car. respects person & property whilst our Stat. embraces both real & personal. Besides with respect to collateral kinred there is a greater difference tho formerly there was none before the Revision of the Stat. of this State. D5784-

The present Stat. differs from the Eng. Stat. of Car. 2^d as it respects property that came in descent, deed of gift or devise from some kindred. The Con. Stat. prefers brothers & sisters of the intestate & their legal representatives to the next of kin, that is the parents of the intestate. And instead of distributing the estate "to all the brothers & sisters of the intestate & on failure of them to any of his kindred that are next ^{in degree} ~~of kin~~" as is clearly the meaning of the Eng. Stat. it restrains

Descents

the Distribution to those Brothers & Sisters, & on failure of them to such kindred as are of the blood of the ancestor from whom the estate came - In this our Stat. agrees with the Eng. *vis.* that it is immaterial whether such Brother &c be of the *1st* blood or whole *pro* *vice* they are of the blood of the ancestor from whom the estate came -

— With respect to persons & *pro* real estate as was acquired by the intestate any other way than by direct, deed of gift, or devise from some ancestor - It differs in including Brothers & Sisters of the whole blood to the next of kin *viz.* Parents, & in making a difference between Brothers & Sisters of the whole & of the *1st* blood & this is the only difference - For altho the Stat. proceeds to point out that in default of Brothers of the whole blood Parents shall take the estate, & for the want of such claimant's Brothers & Sisters of the *1st* blood, yet this is no more than would have been effected if the Stat. had after the preference of the Brothers &c of the whole blood made use of the same terms used by the Stat. of *Car.* *viz.* the next of kin & then legal representatives.

The mentioning Brothers & Sisters of the
1/2 blood in the Stat. expressly serves the purpose
of ascertaining that Brothers &c are to be pre-
ferred to grandfathers, grandmothers &c who are
in equal degree with them from the intestate.
And altho this express provision is not made
by the Eng. Stat. yet the Courts at Westminster
Hall have so construed the Stat. as to give
them the preference which is secured to them
by our Stat. In all other respects our Stat. of
distribⁿ is a literal transcript of the Stat. of Eng.

In discussing the Subject I have
computed the degrees of Kindred by the ^{new} Court,
as is done by the Eng. Cts when distributions take
under the Stat. of Eng. & have supposed the same
construction of terms is to be given under
our Stat. as have been given to the same terms
by the Eng. Cts. - For whenever the terms used
in the Eng. Stat. have rec'd a construction of
certain determinate Ideas are affixed to
them by the adjudications of Cts & we enact
a Stat. upon the same Subject & use the same
terms, it carries evidence in the highest degree
that the Legislature is contented with the con-
struction given to these terms, so if it had

2d CON.

been otherwise they would have expressed themselves in other terms, or at least have given an explanation to the terms used conforming with their own ideas - since the terms used were well understood to convey certain definite ideas in that country from whence we derive our language & laws -

The Legislature must be supposed when they enacted the Stat. to have adopted the construction given it by the Exp. &c. & in all cases where there are Exp. Statutes which we have adopted or copied at a time when such Stats have rec'd a construction I apprehend such construction is emphatically our Law. It is the same when they use technical terms without defining them - We have no where to refer but to the Exp. Law Books where we shall learn their definition - We shall acquire from them the determinate meaning affixed to such terms, & these definitions are as truly our Law or the legal definition of such terms in this country as it is in Eng. - as much so as if the Legislature had defined the terms in the same language used in the Books

Descent

As for instance where our Stat. punishes murder without informing us what murder is & how distinguished from other species of homicide; we must resort to ~~the~~ books of the Law & from them we may learn what was intended by the Legislature. — So when the Legislature enacts a copy of an Eng. Stat. the rec^d construction at the time our Stat. was enacted ought to be discerned & deemed ^{of the highest authority} ~~importance~~ — I shall therefore consider the decisions of the Eng. Ct^s in such cases as have come under the Stat. of Car. as ^{authoritative} ~~precedents~~ which will govern our Ct^s in their decisions with the exception of those cases where our Stat. has expressly enacted differently which have already been pointed out.

1st If that clause of our Stat. which provides for the distribution of the estate of a dec^d person among his child^{ren} & ^{their} legal Represent^{ts}. —

Since the Repeal of that ^{part of the} Stat. which regarded primogeniture in so great a degree as to give the oldest where there were ^{issue of an} ~~no~~ elder son, a double portion — Such child^{ren} & their legal representatives share their estate in equal portions that is if the child^{ren} are all living they take equally. If some of the child^{ren} are dead leaving child^{ren} &

Descents

whilst others are alive such grandchild of the intestate take what their parents would have taken had they been living— If all the children had been dead leaving children such children will now take per capita each in his own right an equal share & not per stirpes— and among lineal claimants representation is continued ad infinitum and as long as any lineal descendants are to be found collateral kindred are excluded. It is immaterial what kind of estate the intestate owned at his death whether real or personal or whether the estate came to him by descent or was acquired in any other way it is distributed all in the same manner— It is remarkable that the Stat does not design to contemplate the estate of women but I presume no doubt can be entertained but that the estate of a dead female is to be distributed in the same manner as that of a male— It has been a question in the Cons. Cts whether a posthumous child was entitled to a distributive share under the Stat of distributions, but it is settled that such child shall share equally with his other brothers & sisters if he has any whatever may be the ideas entertained on the subject by the Com. Law.

It is clear by the Civil Law that such child is entitled to his share equally with his other brothers & sisters if he has any whatever ideas may be entertained on the subject by the Law. & the Civil Law has always governed in the construction of the Stat. of Distributions

In the case in Atk. the Chancellor says that it is fully settled that the Stat. of Distributions is to be construed by the rules of the civil Law. It was objected that it was impossible that such child should inherit before it was in esse for the distributary share under the Stat. vested in the claimant immediately upon the death of the intestate. So that if such claimant should die before distribution, yet his share was transmissible & would go to his representatives. & it is admitted that such distributary share vests upon the death of the intestate, but the estate when there is a posthumous child, to speak in the language of civilians, vests *in ventre sa mère*. In that point see the case of *J. Wallis v. Hodgson* 2 Atk 115. which is an authority where the case was E. Wallis sister of J. Wallis born after the death of her father should inherit a share of his estate with her mother who by the Stat. of James 2^d

Descent

altho she was nearer of kin to the child than a brother or sister could be is placed upon the same footing with brothers & sisters. It was determined that E. Wallis should share equally with her mother, and altho the doctrine laid down in Palmer & Alcott, & Gudgeon vs B. is recognized as good law that the distributary share vests immediately upon the ~~testator's~~ intestate's death yet it was held to be no ^{reason why} objection that E. Wallis should not take her share. The Chancellor held that she was a person in remm natura & capable of taking in ventre sa mere. So it was also held that a devise to such a child was good & a bill in his favor might be brought to obtain an injunction for committing waste.

A distinction obtains in the Civil Law between a child in ventre sa mère, & one only conceived. The former is entitled to a share of its parents estate while the latter is not. I find no case in the Eng. Reports recognizing this as a sound doctrine & I apprehend in this country where posthumous children take, no such difference has ever been attended for

Of that came of the Stat. of descents which declares that as to real estate which came by descent or deed of gift to the intestate from some ancestor or kindred that the same shall in case there are no lawful children of the intestate nor legal representatives of such child descend to the brothers & sisters of the intestate & their legal representatives of the blood of the ancestor from whom the estate came, & for want of persons in a full degree this in which such estate shall descend to the next of kin to, & of the blood of, the ancestor from whom it came

In this branch of the Stat. if there are no children of the intestate, or their legal representatives it descend to the brothers & sisters of the intestate provided they are of the blood of the ancestor from whom the estate descended & it is immaterial whether they are brothers or sisters, the whole or of the in blood, they shall inherit equally if they are of the blood of the ancestor &c.

The requirements of the Stat. are that the person who inherits shall be a brother or sister of the intestate & that they be of the blood of &c. Suppose J. S. dies intestate having rec'd an estate from his father Thomas Stiles by descent & leaves J. Stiles his brother of the whole blood & also leaves his brother Dick of

Descents

Stiles of the $\frac{1}{2}$ blood. The son indeed of ~~his~~ ^{his} Father Reuben but not of his mother Mary Stiles, in such case Dick shall inherit equally with Tom for he is brother of $\frac{1}{2}$ as well as Tom. & he is equally of the blood of Reuben from whom the estate came.

Let us suppose also that W left a Brother Sam Name the son of his mother Mary by her first husband. In this case Sam is excluded from the inheritance of such estate so descended from Reuben for altho he is the brother of W he is not of the blood of Reuben which the Stat. requires. If there was no authority to guide me as to this point, the general intention of the Stat. which manifestly intends to preserve the estate in the Family from whence it came would furnish an answer to any objection; as the general object is that the Estate shall again return to the blood of the ancestor from whom it came & the $\frac{1}{2}$ brother Dick Stiles has an equal quantity of the blood of Reuben from whom the estate came with Tom. But this idea is supported by precedents, for it has been adjudged by the Eng. Court upon questions that have arisen between brothers of the whole & of the $\frac{1}{2}$ blood that those of the $\frac{1}{2}$

shall take equally with those of the whole - for as ^{no} discrimination was made between brothers of the $\frac{1}{2}$ & those of the whole blood it was out of the power of the C. to make any as all that the law required was that the person claiming should be next of kin, which was to be ascertained only by computing the degrees of kindred & by doing this we arrive as soon at the $\frac{1}{2}$ as the whole blood. It was proximity of blood & not the quantity that was required by the Stat. Vent. 316. 323. In the case of Tracy & Smith this point was settled by the whole Court which has ever since been adhered to tho' there seems to have been before that time a different determination. The same observations may be applied to our Stat. - no discrimination is made in this branch as it respects ancestral estates - it requires that the claimant should be the brother of the intestate & such is Dick.

It also requires that the claimant should be of the blood of the ancestor from whom the estate came, & Dick ^{has} this qualification also. It is therefore out of the power of the C. to add a qualification not required by the Stat. & if ^{there is} no relation of the intestate who is of the blood of

Descents

Remember then such estate ~~is~~ escheat.
It is not so expressed in the Stat. but this
is a necessary consequence of the restriction
laid upon the inheritable quality of such
estate. As the doctrine of escheats is not
applicable to Person^{al} Estate it will be im-
possible to find any precedents respecting
this matter in cases that have arisen un-
der the Eng. Stat. of ~~Settlement~~^{Settlements} but it is an-
alogous to the Eng. law of descents furnished
by the feudal maxims that whosoever in-
herited an estate must be of the blood of
the first purchaser, & the known consequence
is that it would escheat rather than any
other person should inherit would there-
fore in this instance happen. That ac-
cording to the feudal ideas of the blood
which meant direct descendants only when-
ever a person purchased an estate it could
be inherited by no person but the heir of
his body & this was the law as it respected
a purchased estate or *nomine feudum*
as it was called. For the purpose of settling in
collateral kindred to the inheritance, just
suppose the maxim to be a fiction of law

was invented that every London room should be held as antiquum & that the Law supposed that it descended from some ancestor - and as it was impossible to know from what ancestor whether from maternal or paternal lineage, it was to be considered as a kind of indefinite antiquity that might have descended with the same probability from one ancestor as another - This fiction let in all the collateral kindred of the dec'd to inherit such estate in their order for it being uncertain from what ancestor it descended there was a degree of probability that it came from the ancestor of the claimant whatever he might be - so that he was a kinsman of the dec'd & probably to all - This probability created by fiction was sufficient to prevent the estate from escheating - but when the estate was actually a descended estate, it could not be inherited by any kinsman on the part of the mother & vice versa, & on failure on part of the father or on part of the mother such estate ceased to have any inheritable qualities - The Stat after having provided for

Descents

for Brothers & Sisters & their legal Represen-
tatives proceed to direct the descent of such
estate to the next of kin to, & of the blood
of, the ancestor from &c -

It is apparent that the legislature
has not used the term "of the blood" in the
feudal sense it being a maxim of the
feudal system "that no person shall in-
herit an estate unless he was of the
blood of the 1st purchaser" which was
understood to be some person lineally
descended from him to the exclusion of
his collateral kindred -

It cannot be so understood in
this State; for when the Stat. made pro-
vision that the estate should descend to the
next of kin to, & of the blood of the ancestor,
if it descended from a parent it was, in
the event of a total failure of all lineal
descendants of the ancestor from &c, absolutely
unavoidable, it thus understood. For in the
case but if it dies without brother & their
legal &c of the blood of the ancestor then &c
it shall descend to the next of kin to, & of
the blood of the ancestor &c, but in this case
all the lineal descendants of the ancestor have

utterly failed - Therefore it can't mean
his lineal dependants, for it is clear such
estate is already descendible, by a previous
provision of the Stat, to the Brothers & their
Rep. if they are of the blood of the ancestor.

If the estate came from a father
or mother, it is manifest in the feudal sense
of the word the Stat. has by mentioning the
brother & sisters of the intestate & their leg. Rep.
included every person that could be of the
blood of such ancestor, It would therefore
be absurd to provide that on failure of
such it should go to the next of kin of the
blood of the ~~ancestor~~ intestate - for there
would be no such persons - It may be said
that notwithstanding this, the feudal sense
may be a just one - for the estate may
have come from some collateral relations
as an Uncle or a Brother - & that it is in-
tended when the estate comes from them
that it should on failure of Brothers &c of the
intestate & their leg. Rep. to go to some lineal
descend't of him from whom the estate came
as for instance the lineal descend't of an Uncle
& their leg. Rep. However this might be sup-
posed to be the case if the terms were no

Descents

are used only when providing for the
next of kind - but it proceed farther
& says the estate shall go to the brothers
& sisters of the intestate ~~to~~ of the blood
of the ancestor from whom it came But
in the feudal sense of the word the in-
testate could have no such brothers &
sisters when the estate came from an Un-
cle or Brother - for his brothers & sisters
could none of them be lineal descen-
dants of such Uncle or Brother - In all
such cases then there would be no persons
to take at least the brothers & sisters of the
intestate would be excluded manifestly
contrary to the intention of the Stat -

Of the Blood of the ancestor
must mean something more than mere-
ly some lineal descendant of the inter-
state, it being demonstrated that the Stat
did not intend that it should be used
in the confined sense appropriated to
it under the feudal system - I cannot
conceive of any other meaning that can
with propriety be applied to it than
this - that the person entitled to inherit
must be related to the person from whom

and then it is for this purpose immaterial whether he be a Father or an Uncle if related he is of the blood of such ancestor. This I apprehend must be the true meaning of the terms, since it can not mean those only who are descended from him. Admitting this construction to be just one there is a tautology in this clause of the Stat. for the words "to go to the next of kin to, & of the blood of the ancestor" which is the same thing as to say "to such person who is next of kin to such ancestor & at the same time related to him" or in other words "to the next of kin of such ancestor who is next of kin to him". That "of kin to him" and "of his blood" mean the same thing we have the opinion of the Eng. Lawyers who translated the Latin Stat. of Hen. where a distribution is directed to be given or granted "to the next of kin", which in the original words is "*proximo de sanguine*". In this case I will hazard a conjecture that there has been an omission of the words "the intestate" to be inserted immediately after the words "next of kin to".

Descents

which will rescue the Stat. from the imputation of tautology - The Stat. then will stand thus "to the next of kin to the intestate & of the blood of the ancestor from whom it descended". As the Stat. had before directed that the estate should descend to the brothers & sisters of the intestate of the blood of the ancestor &c. so now on the failure of such relatives of the intestate the next object in view is the next of kin to the intestate with the same qualification of being of the blood of the ancestor. It is as much as to say "If we can't find a brother or sister with this qualification we will select his next relation who has that qualification". In addition to this when we examine the subsequent parts of the Stat. we shall find that when ^{there are} other estates besides ancestral such estates are to be distributed among the brothers & sisters of the intestate as the first objects of its bounty. Upon failure of them it next contemplates the nearest of kin to the intestate. Therefore to preserve an analogy in all parts of the Stat. it would seem as if the Stat. intended to contemplate the same objects of its bounty in this clause of the

Stat. as in other parts, only requiring to answer a particular purpose that such persons should have the qualification of being "of the blood of" or in other words "of kin to" the ancestor &c. or if the words "to" & "of" were erased the Stat. would then have the construction contended for. For it has been determined that when the Stat. speaks of the next of kin it uniformly means the next of kin to the intestate. — Of that clause of the Stat. that directs

"that all the estate except ancestral shall in the first place descend to brothers &c. of the whole blood & their leg. Rep. & on failure of such heirs to his parents or on failure of parents to the brothers &c. of the whole blood & if there are no persons of this description to the next of kin to the intestate & their leg. Rep.,

I apprehend it will be found that the terms leg. Rep. in the last clause of this Stat. are misplaced & ought to have been inserted next after brothers &c. of the whole blood. — For to suffer them to remain in the place in which they are printed in the Stat. book will not only destroy the symmetry of the Stat. but manifestly oppose the intention of the Legislature & render

Descents

The Statute in former part of this clause
negatory & contradictory to itself. Where
we find the Stat. in the former part of this
clause providing for the Brotherhood of the
inter. of the ^{whole} blood & their Leg. Rep. we should
expect that when provision was made for
the Brotherhood of the in blood that a like
provision would be made for their refugem-
tatives, but the Stat. as now penned falls
short of this & makes provision for the Bro-
therhood of their blood without mentioning
their Leg. Rep. - So in the case put "of J. S.
deceased who purchased an estate with his
own money & having left neither child nor
their Leg. Rep. or Brothers &c or their Rep. of
the whole blood or partly any Parents; but
Sam & Sally Rome Brothers &c of the in blood
the Stat. provides that Sam & Sally shall
take such estate, but if Sam is dead leaving
childen Sally will take the estate to the
exclusion her brothers children for they are
not provided for by the Stat. as it now stands.

It can hardly be supposed that the Legisla-
ture meant to exclude Sam's children for had
Sam & Sally been Heirs of the whole blood
Sam's children would have taken an equal

share with Sally & to preserve the symmetry of the Stat. we should expect the same provision made for the Rep. of the ^{brotherhood of the} 1/2 blood as was made for those of the whole blood & by the transposition of the words "and their legal rep." as proposed this provision will be effected, for in that case the Stat. will read "to the brothers & sisters of the 1/2 blood & their leg. Rep. & for want of these to the next of kin" - And it ought to be remarked that in the former clause of the Stat. respecting ancestral estate when it provides for brothers & sisters of the intest. of the whole blood of the ancestor from &c, it also provides for their legal rep. - We may therefore reasonably suppose that when ^{we find} in another part of the Stat. where provision is made for brothers &c that it is also made for their legal representatives & that also in this part where provision is made for brothers & sisters like care would be taken of their Representatives. - Presides it seems extraordinary that the Stat. should go on & make provision for relations more remote than brothers & sisters, & then provide not only for them but their leg. Rep. & neglect to make provision for the Rep. of such brothers & sisters -

Parents

Let the words remain where they are & the
stat. is plainly repugnant to itself for pro-
vision is made that there shall be no repre-
sentation after brothers & sisters childⁿ i.e.
if J is dead leaving brothers & sisters childⁿ
such childⁿ take with their uncles, but if
all the brothers are dead leaving childⁿ & some
of their childⁿ leaving childⁿ such last childⁿ
shall be excluded from the inheritance, no
representation being admitted but among
brothers & sisters childⁿ for example J died
leaving his brothers Tom & Harry they inherit
equally & if Tom is dead leaving Geo. he takes
by rep. what his father would have taken
but sup. Geo. also dead leaving son Alfred
though son could not take with Harry for
this would be to take by Rep. more remote
than what is provided for & indeed it is
expressly forbidden. And the case would
have been the same if Harry was dead
leaving a daughter Susan - she would have
taken the whole of her Uncle John's estate
to the exclusion of Alfred for representation
is not admitted among collaterals farther
than brothers & sisters childⁿ But to let
in Alfred would carry the right of Rep. to
the grandchildⁿ which is forbidden by

the Stat. But if we admit that the words
 legal Representatives are rightly placed it will
 be in ~~accord~~ to intent with Susan which is
 expressly forbidden in another clause of the Stat.
 We will suppose Tom & Harry to be brothers
 of the 1st blood & both dead & for want of such
 persons it ascends to Geo: & Susan for they are
 next of kin & if Geo: is dead then must the
 estate descend to the next of kin & their legal
 Rep. id est to Susan, & Alfred who is the leg. Rep.
 of Geo: Thus that which is forbidden in one
 branch of the Stat. is effected in another & Rep.
 carried on among Collaterals ad infinitum.
 But if we suppose the terms misplaced the
 Stat. will read thus "to brothers & sisters of the
 1st blood & their leg. Rep. & for want of such
 to the next of kin" in such case Tom & Har-
 ry would inherit equally - Tom being dead
 his son Geo: his leg. Rep. would inherit equally
 with his uncle Harry & admitting Harry to
 be dead would inherit equally with his cousin
 Susan but Geo: being dead Susan would in-
 herit the whole as being next of kin & Alfred
 would be excluded - for Rep. cannot go farther
 than brothers & sisters children & Alfred is the grand-
 child of such brother. If indeed Susan was dead

Descendants.

Then Alfred would inherit not in right of representation but by being next of kin & if Susan left a daughter Polly, Alfred & Polly would inherit equal shares being alike near of kin to the intestate. Q

The same ^{rule} is observed among collaterals as that between Brothers & Sisters children. If they are more remote than such children there can be no rep. as where the only relatives of Isaac Charles his uncle & Edmund a son of a dead Uncle. In such case Edmund is excluded being ^{in the} 4th degree, that is one degree more remote than Brothers & Sisters children being in the same degree as Alfred. whom we have seen could not take by representation; but if Charles was dead Edmund would take as being next of kin and for the same reason that uncles & aunts share equally with nephews & nieces when they cannot take by representation Edmund would share the estate with Alfred & Polly per capita each. Ans —

That the doctrine here stated to show that the words "equal Rep." are misplaced is just for a cap in Vesey ³³³, where the question was whether the child of the Uncle & the Brothers grandchildren were in equal degree

it was determined that they were & that they should take equal shares of the estate of the intestate. — See Peck's case 1st P.M. where it was determined that a brother's grand child could not inherit with a brother's child. See also Powers case 1 P.M. where it was determined also that an aunt's son could not inherit with an uncle.

"Of that clause in our Stat. that provides that on failure of lineal descendants the estate shall go to the brothers & sisters & their leg. Rep.

It will be found upon examination of the cases which have arisen in the Ex. Ch. under the Stat. of distributions where the terms leg. Rep. are used & from whence we derived them & introduced them into our Stat. that the children of the brothers & sisters of the intestate do not in all cases take as Rep. to their Parents, that is, they do not take by representation what their Parents would have taken. — as for instance Suppose J. to have died leaving his brother Tom & his nephews Robt & Peter the sons of his brother Harry who died in the life time of J. In such case Robt & Peter would take a moi-

Descent
morety of the estate by right of rep.
taking in right of their father Harry
what he would have taken but when
all the old stock of the next of kin to
the intestate are dead before the intestate
the children or lineal descendants no longer
take by rep. but in their own right
as next of kin. If in the case just Tom
had also been dead leaving a son James
James would be one moiety of the estate as
rep. to his father but the old stock being
dead that is, Tom & Harry brothers of J.S. their
children no longer take by rep. but in
their own right as next of kin to J.S. then
take equal shares. But where there are
any of the old stock living whilst others
are dead leaving children they take per stirpes.

That this idea is supported by
the Eng. decisions see the case of Davis 3^o
page 50. where the intest. left only nephews
& nieces viz. one nephew by a brother & 3
nephews & 2 nieces by a sister. In this
case the decree was that they should take
per capita & the Chancellor observed
that the claimants did not now take
by rep. but as next of kin, & that it would

have been otherwise had one brother or
sister been living - See also the case of Lloyd & Jones
2 Ves. 213.

From this construction of the term
~~leg.~~ Rep. there necessarily follows this con-
sequence that if there are any relatives of
J.S. as near of kin as brothers & sisters children
where the right of Rep. has ceased by the
death of all the brothers & sisters in J.S. life then
such children will only take equally with such
relatives - The nephews & nieces of the intest.
as in the case of Tom. & Harri's death before J.S.
leaving them children James & Peter, Bob & their
uncle Geo. In such case as James, Peter & Bob
do not take by Rep. but as next of kin & as
Geo. their great Uncle is in the same degree
of kindred to the intestate with themselves
Geo. must take with them -

That this idea is justified by au-
thorities see the case before cited in 2 Ves. 213
& 1 Atk. 454.

It will not only happen that when
the right of Rep. has ceased that Uncles & Aunts
will be let in to share equally with nephews
but if there should be any person in a nearer
degree to J.S. than they are, they will be excluded

Descents

For in the case just of the death of Com.
Starrs leaving their child James, Peter
& John if Solomon Stiles the grandfather
be alive he will take the whole estate
for he is in the 2^d degree, whilst J^s neph-
ews are in the 3^d - This is a necessary con-
sequence of the doctrine laid down in
the case cited that the nephews do not take
jure representationis. but as next of kin
Sack 251. 2 Ves. 213-

We have already seen that the
aunt & nephew stand upon an equal
 footing - that if the nephews can take
where there are no brothers & sisters, so also
can an aunt for where one takes so does
the other both being in the 3^d degree -
If therefore the aunt is excluded by
the grandmother who is in the 2^d degree
so must nephews & nieces be excluded
for the same reason

It has been mentioned that our Stat.
gives to brothers & sisters whether of the
whole or in blood a priority to all other
persons in equal degree - for by the express
words of the Stat. they are to take before
other kindred, only that Parents take

before brothers & sisters ~~whether of the whole~~
^{of the} blood which is no more than what
 they would have done had there been
 no priority mentioned by Stat. - for if our
 Stat. had like that of Cal. 2 - distributed the
 estate to the next of kin parents would
 have first taken as being in the 1st deg. whilst
 brothers & sisters are in the 2^d - But altho grand
 parents are in the 2^d degree as well as brothers
 & sisters our Stat. gives the preference to brothers
 & so that no question of this kind can arise
 under our Stat. betwixt a gr^d father & brother
 or sister, tho this has been a subject of litigation
 in the Eng^l C^t

We have seen that the gr^d mother
 is preferred to the aunt she being in the 2^d
 degree while the aunt is in the 3^d - for the
 same reason the gr^d father ought to share
 equally with the brother of J^r being in the
 same degree -

We have likewise seen that an
 aunt inherits equally with nephews & nie-
 ces when they do not stand in loco parentis
 because they are in equal degree - for the same
 reason an uncle's child & brother's ^{of same} child inherit
 equally both being in the 4th degree -

Decedents

It seems in all those cases the rules
~~have been~~ prescribed by the Stat.
 have been sacredly adhered to, & why
 they should be disregarded in the instance
 of a grandfather & brother I have found
 no reason assigned. Altho no such
 question can arise under our Stat- yet
 it may be important for us to know that
 those cases are to be consid^d as precedents
 founded in principle, for the reason of
 them will extend to cases that may hap-
 pen with us - for the same reason that
 a brother is preferred to a grandfather, a
 nephew or niece should be preferred to
 an aunt & such case is not provided
 for by our Stat- only in those cases
 when they stand in loco parentis -

With respect to the Stat of James
 2^d which places a Mother upon a footing
 with brothers & sisters, it may not be a-
 miss to observe that altho she is to take
 only an equal share with them, & yet
 it has been determined that where there
 is no brother or sister or Leg. Rep. of them
 altho there may be other claimants in

equal degree with such brother as a grandfather
he yet he shall take the whole as being
next of kin in the 1st deg. as he would have
done before the making of the Statute when the
father was not living altho there were
brothers & sisters —

In the case of Stanley vs Stanley ^{18th} 1858
there being no brothers or sisters but niece
of a dead brother & a mother, it was determined
by Lord Hardwicke that the niece should
take with the mother — The principle upon
which such determination was founded
seems very questionable for there being no
brothers & sisters or their leg. Rep. the niece could
not take by repⁿ the brother &c. being dead.
If therefore they could take it must be in
their own right as next of kin — Such a de-
termination is wholly opposed to the current
of decisions respecting repⁿ unless it is to be
reconciled to them on this ground, that the
mother by the omnipotence of a legislative
act is made as a brother & sister & at the
same time becomes a constituent part of the
old stock. In this view of the case the deci-
sion was perfectly just right. In part of the
old stock being alive the niece took by repⁿ

Descent's

A flood in loco parentis - And upon the
same ground according to the decision of
Euclyn & Euclyn if she is consid^d as a brother
he she would take the whole from a grandfather -
altho he is in the same degree -

In the construction of the Stat. of Car-
it was always understood that where there was a
father and mother the whole vested in the father
not indeed as being nearer of kin but as that Stat.
was conversant merely about person^{prop^y} if the
share should vest in the mother it would at the
same instant become the father's - It might there-
fore be as well to suppose it in the first ins-
tance to vest in the father - But where our Stat.
which is conversant about real as well as
person^{prop^y} gives the estate to parents upon
the lure of the brothers & sisters of the whole blood
I apprehend a very different construction
would be given since the mother altho a feme
covert is as capable of accepting real prop^y
as the father she ought therefore to be consid-
ered as a tenant in common with the father
As to the person^{prop^y} thus given by the Stat.
it might be consid^d as vesting only in the
father with the same proximity in this
country as in England. *Fin End*

106

An Essay on Bills of Exchange,
By J. Sapping Reeve Esquire

A Bill of Exchange is nothing more than a written request from one to another to pay to a 3^d person a sum of money. The maker of the Bill is called the drawer, and the person on whom it is drawn drawee, & the person to whom it is payable the payee. It is regulated by the Law Merchant which is the general usage of Merchants in the Commercial nations of Europe & their Asiatic, African & American Colonies & also among the Merchants of the United States of America.

This Law Merchant is recognized by Courts as the law of the land & is not provable by the testimony of any person whatever. It is true the Law Merchant is not universally the same in every country. And wherever a usage prevails in one country variant from the general usage of nations, this local usage is the same to the Law Merchant as a custom is to Com. Law & this like other customs is provable by witnesses, and is

It is to be presumed that the drawer

Bills of Exchange

has received money of the Payee & that the drawee has the effects of the Drawer in his hands to the amount of the Bill if he accepts it. But this is by no means necessary to the validity of the Bill - for whether the drawer has rec^d money or not, or whether the drawee has effects of the drawer or not, the drawer is liable to the payee if the drawee does not accept the Bill, or has accepted it & refuses to pay it. When the payee has a Bill & presents it for acceptance, if the drawee refuses to accept it, it then becomes the duty of the payee to give the drawer notice of such refusal that the drawer may have an opportunity to withdraw his effects if he had any in the drawee's hands, & by means of this notice the drawer becomes liable to the payee in an action of debt or indebitatus Assumpsit. If the Bill is accepted & not paid according to the tenor of the Bill the payee must give the drawer notice of the nonpayment, that he may charge the drawee as in case of non-acceptance - and if this notice be not seasonably given any loss occasioned by the removal or Bankruptcy of the drawee must

fall upon the payee - for in case of non-acceptance the neglect of the payee in not giving the drawer notice is consid. as a discharge from the payee to the drawer - for he might have withdrawn his effects in the hands of the drawer or in case of non payment the payee is consid. as giving credit to the drawer & has an action on the case against the drawer & by giving notice of non payment he has an action against the drawer & it is optional with him against whom he pursues his remedy. And if he elects to sue one in preference to the other & cannot obtain payment of the one whom he sues he may resort to the other. The mode of giving notice to the drawer of a refusal to accept or ^{a refusal} to pay after acceptance is ordinarily by protesting the Bill which is done in writing before a Notary Public which protest is entered by the Notary to have been made.

If there be no Notary the same is done in the presence of two or more respectable inhabitants & by them certified - which protest is sent back to the drawer by the first post after the time of payment and when this mode

Bills of Exchange
of notice is pursued not only the contents
of the Bill as in Com. Bills but the damage
sustained thereby, in most countries estimated
at 20% per cent, are recoverable. If the Bill
be accepted to be paid agreeable to the tenor
of it and not paid at the day of payment
there ^{are} by the Law Merchant 3 days allowed
called days of grace. If the Bill be drawn
payable in a month & accepted payable
in six months this shall bind the acceptor
according to his acceptance - & yet if the
payee would charge the drawer he must
get the Bill protested for non-acceptance
The Law is the same where the drawee ac-
cepts the Bill for part & refuses to accept
for the remainder. Whatever opinion may
have prevailed in Courts respecting partial
acceptance it is now settled that such an
acceptance is binding. Any words which
indicate the drawee's assent to pay the Bill
is an acceptance & altho' in other contracts the
Law requires that there should be a conside-
ration or the evidence of such consideration

470

Bills of Exchange
from the acknowledgment of "value rec^d"
yet in the case of Bills of Exchange if
there be no consideration for the engager
or it be upon a partial consideration the
person contracting is bound. When a Bill
is made payable to the payee or order the
payee may endorse it over to another &
the property becomes the indorsee's who has
the same remedy against the Drawee & Drawer
as the payee had & also against the indor-
sor who is consid^d as making a new Bill -
If there are ever so many indorsors he may
have his remedy against either whom he
elects & they in their turn against any
prior indorser - Whatever discordant opin-
ions may be found in the Books it is now
settled that an indorsee may sue any indor-
sor without making any demand upon
the drawer or endeavoring to recover the
money of him. 2 Burr. 678. When an in-
dorsee sues an indorser, he need not prove
the drawer's hand writing - for if it be forged
the indorser is liable. Salk 127. When a
Bill has been accepted, it is the last indorsee

Bills of Exchange
who has a right to the money & can sue the
drawer - but if a prior indorsee pay the last
indorsee he may sue the drawer. If an indor-
see or payee accepts any part of the Bill of the
drawee he can never resort to the drawer or
indorser. It is not in the power of the payee
to indorse part of the Bill so as to subject
the drawer to more actions than one, but if
such indorsee will acknowledge satisfaction of
the remainder upon the Bill such indorsement
is good Salk 65. An indorsement in blank with
only the indorser's name puts into the power of the
holder to fill it up as he pleases - either with an
assignment of the Bill, or a power of attorney
& whatever it be the indorser is concluded thereby
Salk 128. But untill the Blank is filled up it is
no evidence of the property Salk 130. A Bill "to
one or bearer" is not assignable Salk 125. If such
Bill be found or stolen it vests no property in the
finder or thief - yet if the drawee pay such Bill
it shall be allowed him by the Drawer & if
such finder or thief pass the Bill to another
person who is not privy to the writing a property
in the Bill is acquired in the transfer. If a
drawee refuses to accept the Bill may be ac-
cepted by a person on whom it is not drawn
for the honor of the Drawer & such acceptance
is binding. In this case the Bill must be protested
so that the drawer may be charged by the payee & by

The acceptor. In some instances the drawer may have an action on the case against the drawee - as if the latter accepts & afterwards refuses to pay & the drawer has been obliged to discharge the payee - for the acceptance of the drawee is prima facie evidence of his having the drawers property in his hands to that amount & this by the custom of Merch^t subjects the drawee to the drawer. But altho acceptance is such prima facie evidence yet if it appear that the drawee has not the effects of the drawer the drawer will fail of a recovery. If the acceptance is for the honor of the drawer no action is maintainable by him against ~~the drawer~~ ^{such acceptor} upon the custom - for from such acceptance no presumption arises that the drawee had effects in his hands. A Bill may be indorsed to the drawer & the indorsee may maintain an action against the drawee after acceptance. On the other hand the drawee ^{who has paid the bill} may have his action against the drawer for so much money laid out at his request. But if it appear in evidence that the drawee at the time of payment had in hands property of the drawer to the amount of the Bill he will not prevail. When the drawee accepts & the Bill is indorsed the indorsee may maintain an action against the drawee altho the drawers name was forged - but the payee could maintain no action for he would be receiving benefit for his own wrong, yet an innocent indorsee is not to suffer who probably rec^d it upon the evidence of the acceptor who is supposed to be acquainted with the hand writing of the drawee. When the holder

^{Bill of Exchange}
if a Bill has found an indorser & taken his
body in execⁿ which proved insuffic^t to reco-
ver the money due, - altho he let such indorser
at liberty, he may yet resort to any other
indorser.

A note "to the Bearer" is a negotiable
instrument tho' not a Bill of Exchange. for
every Bill of Exchange must be made paya-
ble "to order". ~~And yet it appears as an
unsettled point whether it be good without an
acknowledgment in the note or "value rec^d" tho
the better opinion is that this is not neces-
sary.~~ When an indorsee has rec^d part of
the sum of an indorser, he shall notwith-
standing receive the whole from the drawer.
A Bill made out of a particular fund
is no Bill of Exchange nor one payable
^{upon} a future uncertain contingency.

Time

Essay, on the liability of infants
for their Contracts.

(By Tapping Reeve Esq. of Litchfield.)

By the term infancy in our Law is understood a person under the age of 21 years. During the period of infancy the infant is subjected to the authority of his Master, Parent or Guardian as the case may be—his services belong to them & it is generally true that he cannot by his contract bind himself in such a manner as not to have it in his power to avoid those contracts if he pleases to avoid them. The contracts of others with him shall bind them even when there is no other consideration than the infants contract. Altho' an infant is not liable upon his contracts yet he is liable both civiliter and criminaliter for his torts. If an infant at the age of seven years or under do that which in others would be an offence, he is not liable to punishment; for the presumption of law is that he has not understanding sufficient to commit a crime; against which presumption no proof is admissible. Between the age of 7 & 14 the presumption is that for want of understanding he cannot be an offender; but evidence is admit-

sible to remove this presumption; & if he be
found *doli capax* he shall be punished as
a criminal, in this case *malitia suppleat æ-
tatem*. Between 14 & 21 infancy can in no
case be any excuse. The same rule obtains as to
his liability for any injury done by him & he
is liable to an action of fraud, or indictable
as a cheat. Altho an infant may avoid his
contracts generally, yet he shall be bound
when those contracts are for necessities which
are *Physick, Clothing Food Instruction* and those
must be such as are suitable to the infants rank
in life, ^{which} it is reasonable to suppose that
a person under his circumstances should pur-
chase. for it may be very necessary that an
infant who has no parent, Master or Guar-
dian, or who by the Providence of God is sep-
arated from them so that he can make no
application to them for relief, to contract for
his comfortable subsistence; for those things
which whilst with them under their care &
protection would not be necessary for ^{him} them to
contract for, since from them he would receive
all that was necessary for him to receive. Or
when a child is so treated by an unnatural
parent or cruel master that a comfortable

470
A reasonable subsistence is denied him; the law will substantiate his contracts for necessities - that is the Law puts it out of the infant's power to refuse payment for necessities afforded ^{him} under such circumstances as have been mentioned. And even in this case whenever his contract is so managed that the consideration of the contract from the nature of the security cannot be enquired into, such security is void. If the Law was otherwise the infant might be compelled to pay much more than a reasonable price for his necessities & thus thro' indiscretion ruin himself. Hence we find that the infant cannot bind himself in a bond with a penalty for in this case the Court cannot enquire into the consideration, but judgment must be rendered for the whole sum in the condition with interest, when perhaps the real worth of the necessities was not half so much as the sum contained in the condition. This I conceive to be the true reason why a Bond with a penalty does not bind the infant - and not the reason commonly mentioned in the books "that it cannot be for the advantage of the infant to subject himself to a penalty," as the Court are ~~empowered~~ vested with power to charter

down to the Principal sum & interest. And however this ^{might} ~~may~~ be a reason in Courts of Law before the Statute of Ann vesting the Courts with this power of chancery. Since that it has certainly ceased to be a reason. — Upon this ground the consideration of a single Bill may be enquired into & altho' the Bill acknowledges a debt of 50£ yet the judgment may be for 5£ only; if it be found that the necessities for which the Bill was given were of no greater value. We find also an infant is not bound by a note of hand negotiable; for the consideration of such a note cannot be inquired into — he is however bound by a note not negotiable, for in this case the consideration may be enquired into. So again he is ^{not} bound by a bill of exchange when no inquiry can be made respecting the consideration. No action is maintainable against an infant upon an Insimul computasset. And altho' it is true that ^{the former of} an insimul computasset may be enquired into, the reason of the case seems to be that the only consideration set up as a ground of the promise is an account stated where the law does not consider the infant as having sufficient discretion to state an account. In all these cases

tho the security is void yet the contract ¹⁷⁹⁸
remains good. - Thus stands the English
Law respecting the Contracts of infants -
In no case shall the infant be liable for
more than the value of the necessaries pur-
chased, tho an indiscretion in giving a security
which from the nature of it would prevent any
inquiry into the nature of the necessaries
And yet in no case shall it be in his power
to avoid the payment of the just value of the
necessaries. That infants should be bound
to pay the real value of the necessaries is
an idea that has been adopted by our
Courts; and that they should not be obliged
to pay an exorbitant price for those neces-
saries is certainly to be wished & must on
all hands be acknowledged to be a doctrine
highly reasonable. But would not the doctrine
totally destroy the note of an infant in
this Country? A note of hand is treated by
us as a bond ^{with a penalty.} ~~as treated in England~~ If the con-
sideration cannot be enquired into. Might not
an infant in this way be subjected to great loss
when he has indiscreetly given too great a price
for necessaries & given his note for them & thus
subject himself fall a sacrifice to his own in

discretion & the advance of the sharper which most undoubtedly the Law means to protect him against? Is an infants note to be considered void & no action maintainable thereon although given for necessaries? This would be contrary to practice & yet the Law can never afford that protection to infants it means to do unless the idea is admitted; or when infancy is pleaded the rule should be relaxed respecting the enquiring into the consideration & finding the full value of the necessaries without any respect to the sum promised in the note. The adoption of this method or rejecting the note & compelling the creditor to resort to the original contract where the value of the article sold may be ascertained by the Juries, will preserve entire the principles of Law in compelling the infant to pay the just value of the necessaries and at the same time prevent his suffering any injury from his own indiscretion. It is the more necessary to adopt the method proposed when we take into consideration that the articles themselves which are necessaries do not convey to us the full legal import of the term; for that which is necessary for one infant may not be so to another. The circumstances of the infant must always be taken into consideration; for whenever the infant is

480

under the care of a Parent, Master or Guardian
& that government is duly exercised no contracts
for the articles termed necessaries shall bind the
infant ~~for~~ they were not necessary for him. in his
situation. But when the infant in the course
of human affairs is separated from Parent &
& cannot be the subject of their government
& protection, or when an unnatural Parent or
cruel Master, or avaricious Guardian shall so
conduct towards an infant, that a comfortable
subsistence is denied him, or if they should be
incapable of affording that subsistence, the
infant's contracts for necessaries should bind
him. This may frequently happen. A minor
is liable to be called into the 'field' in the time
of war & in a distant place separated from his con-
nections & cannot resort to them for relief let his
circumstances be ever so distressing. The same may
happen when on a journey upon business or for
the recovery of his health. And the case is not
altered if the infant voluntarily leaves his
Parent with or without reason. for it is the situ-
ation that gives efficacy to the contract without
any reference to the preceding cause which occa-
sioned that situation. Thus I conceive stands the
Common Law. It is said by some that our Statute
has made a material difference, & consid-
ered all contracts of infants void, so that their
contracts for necessaries are equally void as their

other contracts. I conceive the Statute has made no alteration, but is only a statute in affirmance of the Common Law. The mode of expression made use of in the Statute is "All persons under the government of Parent, Master or Guardian, shall be incapable of contracting." The true construction of which I conceive to be such as are the subjects of their actual government, for such can never want to contract for themselves. There was no occasion for trusting them. But this incapacity ought not to be extended to all such as have parents &c. &c. situated with respect to them that no government or protection can be afforded them. In this view of the matter it differs not from the Common Law unless it may be supposed that the Statute intended to protect minors from contracting when under the actual government of parents &c. however unduly that government was exercised. It can hardly be thought that so inhuman a provision could be the object of the Legislature or that the term "government" in this Statute was meant to extend to a government unduly exercised. I conceive such a case ought to be considered as an exception which the Statute never intended to cover. Besides if the Statute had intended any thing of this kind it to over-

turn the doctrine of necessities, a doctrine 1882
the time the Statute was enacted thoroughly un-
derstood, then terms more decisive of the inten-
tion of the act would have been made use of.
This has long been the law of this State & yet the
doctrine of necessities has never been questioned.
The Statute at the time it was made received
no such construction as was subversive of this
doctrine. A total silence in all our Courts res-
pecting any alteration actually made or intended
is confirmatory of the construction I contend for.
In the revision of this Statute we find that after
the statute has declared that "all persons under the
government of Parent, Master &c are incapable
of contracting unless licensed by their Parents &c"
The statute enacts that "In such case the Parent
Master or Guardian shall be bound thereby."
The last clause was not the statute previous to
the revision. But I conceive that was no alter-
ation of what the law before was, but a more
express declaration of what the Statute inten-
ded, - for the obscure manner in which the Statute
was before expressed might lead to this construc-
tion that a person allowed by his Parents &c to
contract was bound by that contract, which the
Statute never intended. The license to contract
added no efficacy to the contract so as to bind
the person contracting but only operated so as to
make the ^{contract of the} person thus licensed binding upon the
Parent &c, or in other words, the contract of the mi-

... was in fact the contract of the
parent & all of which is no more than de-
claratory of the Common Law. It might as well
be said that the Stat. by the mode of expression
intended to destroy the Common Law doctrine,
"that an infant's promise was not absolutely
void but voidable" which I believe will hard-
ly obtain. it would be novel & introductory of
much confusion. For upon this idea suppose
a contract fairly made between a minor & an
adult. the minor purchases of the adult an arti-
cle at a fair price & pays the money. If the con-
tract is void the minor will be entitled to re-
cover back the money paid - no judgment could
be rendered against the minor (tho by default)
but what would be error in fact; & the whole
doctrine of an infant's confirming a contract
made during infancy, after he arrives at full
age, is at an end. For if it was void in its origi-
nal state no after promise could make it
otherwise than void. Neither upon this ground
would adults be bound by their contracts with
infants for a void act; as the delivery of goods
by an infant when he notwithstanding is
entitled to recover the value of the goods in
Trove, if the contract to deliver was void. &
this would never be a consideration.

And a void promise by an infant can ^{never} be considered sufficient to establish the promise of another person to him. All these consequences would be the result of establishing the idea "that an infants promise was absolutely void" which are all opposed to the general received opinion which is founded upon the idea that the promise of an infant is voidable only. And altho we find expressions in Law-writers "that an infants contract is void," nothing is meant more than that such contracts may be avoided. & this construction has often been given to the word "void" when used in a Statute as in English Statute which declares all leases by tenants in tail for longer term than the life of such tenant, to be void. This is construed not to mean "absolutely void" but only "voidable" by the heir in tail after the decease of the tenant. Upon this ^{ground} it is that by the Eng. law when an infant has executed a Bond he cannot plead 'non est factum' but must avoid it by pleading specially - whereas a feme covert may plead non est factum for her incapacity to bind herself is such that it renders all her acts absolutely void. Altho I conceive it to be generally true that the acts of an infant are only voidable, yet I can easily imagine a case

where I conceive some acts void - for at the same time that it protects their indiscretion from injury, it enables them to do binding acts for their advantage, the design of ^{the} privilege to protect infants - So that object therefore must all the rules respecting it be directed. Wherever then a case arises in which an infant cannot receive the protection designed him unless his act is consid^d void, I conceive it ought to be so considered. Many acts of an infant besides contracts for necessities are considered in Law as binding upon ~~them~~ him - for when ever an infant does a right act which the Law will compel him to do, it shall bind him - As if he should make equal partition, or act which the Law may compel him to do, this act is binding. So where a lease is made to A. & his assigns, for a term of time & for a yearly rent A. assigns to B. an infant who enters upon the term he is bound to pay this rent. And where the infant is barely a trustee & executes the trust he cannot avoid such act, for in equity he is so compelled to do - As where an infant executor duly receives, or quits, pays & administers the assets. Or suppose A. is a Mortgagee in fee & dies, the mortga-

480.

ged premises descend to B. his heir & an infant. The Mortgagor pays the mortgaged premises to his executor, by which means he becomes entitled to the land & to the infant conveys to the Mortgagor, the conveyance is binding upon him - for by Law he was compelled to convey. - And by the Eng. Law the Assignment of dower by an infant binds him, for he was by Law compellable to assign the dower. In trials where infancy is plead & necessities replied, it frequently leaves a subject of enquiry What are necessities? For as I observed before the situation of an infant is always to be taken into consideration. Where an infant lives with a parent who provides the articles termed necessities, the infant is not bound. Necessaries of an infant's wife & children have been adjudged his necessities. Money lent to an infant to be laid out in necessities, has been adjudged not necessities unless the loaner took care to see that the money was laid out for necessities. But why should it not be considered as 'necessaries' without the loaner's seeing ^{it} ~~them~~ actually laid out for necessities? - On the Replication it has been determined that the replying "necessaries" generally is sufficient, without pointing out what those necessities are. But since what are necessities & what are not is manifestly a question of

14. Law, I should conceive that pointing them out in the Replication would be the most eligible method; as it would preserve the question of Law to the Court, the constitutional forum for the trial of all legal Questions. — Thinis

See Buller page 155. 182. It would seem on first view that a ^{by this authority} single bond of an infant ^{was void} ~~it~~ void but remark that ~~was~~ an action of assumpsit whereas it ought to have been left on the bond & the promise made after age given in evidence —

In the sub. of mas liab: ^{concerns} the case of a man being forced on the cov. of seisin before ^{damaged} —
Ex. v. King. 30.

An Essay written at the Office
of Tapping Reeve Esq. Litchfield
Decemb. 1. 1798

Baron and Femme

As it respects the liability of the husband for the contracts of his wife & for her torts—When she is liable with him & when he is liable alone—

Legislators have found it necessary to consider husband & wife one person. It was found however that the 2 parts of which this person was composed did not always appear to have precisely the same uniform volition. On the contrary, when both were employed in one affair there frequently seemed to be 2 contending dispositions, bearing some resemblance to the 2 opposite propensities which ^{preachers} influence the human heart the one to virtue, the other to vice;— differing however in one respect, the 2 parts of the person being unfortunately provided with organs of speech which sometimes carried their debates to such extraordinary heights, particularly upon the question "Which should be commander in chief of their transactions?"

That the peace of families & of society was highly disturbed - In order therefore to preserve a proper degree of harmony it became expedient to vest one with the principal executive authority. And as the husbandly reason of the superior strength of his constitution was conceived to be best calculated to transact business, it was determined. that the executive authority should vest in this part of the person, with full power to contract & be contracted with to sue & be sued, in short to represent the whole person in all external affairs - leaving to the silent intrigues of the female part to operate in secret & effect what they would. The husband ~~thus~~ therefore was always supposed to contract & when the wife contracted for anything, even the smallest, necessary, it was by the husband's impulse, the law being always careful to presume that it was by his command, or at least by his assent. For it made no difference as to the house which contracted he being

always liable as long as their behavior corresponded with that darling unity which the law was pleased to predicate of them -

After having thus related the origin of the husband's liability for the wife's contracts, ^{to little more seriously,} we will proceed to distinguish the several cases of his liability. The husband is liable ^{with the wife} for all the wife's contracts made before marriage, provided, ^{they are recovered by} the suit be ^{age} ~~but~~ before the determination of the coverture. A false maxim formerly obtained - "That the husband was bound to pay none of the wife's debts contracted before marriage. This idea compared with the other principle of law which throws all the wife's property into the husband's hands appears very unreasonable - For as the wife has no command over property, it immediately on marriage vesting in the husband it is evident she cannot be liable - But creditors ought to be defrauded - somebody must be liable; & it is reasonable that this liability should

fall upon that property which they
^{but which by operation of law has been taken away from her}
Wife possessed when she was trusted. This
Property is in the husband's hands he ought
therefore to be liable. This old maxim
however is hardly worthy of a refuta-
tion. It has long since fallen with much
other rubbish of ancient Law into its me-
rited oblivion. The Law now is that the
husband runs his risk in marrying - if the
wife has property, it is his. If she is involved
in debt, he becomes involved with her -
or as the marriage-contract expresses it
he takes her "for better, for worse". This Maxim
of the husband's liability for the wife's con-
tracts before marriage is an universal
one. It embraces all the cases that can
arise. But with respect to the husband's
liability for the wife's contracts after
marriage, the Law is a little more
complicated being crisscrossed with
absurd maxims & ridiculous pre-
sumptions which have no founda-
tion in reason and are entirely
derogatory to that dignity which

The Law ought ever to preserve.
 The rule is that the husband is liable
 only where there is an express or im-
 plied assent of his. The this Maxim
 is twisted & tortured & every way to
 embrace all possible cases, it will on
 examination be found extremely in-
 adequate. Where there is an express
 assent the husband ~~ought~~ is unquestion-
 ably liable. But let us examine a
 moment the evidence that English
 Lawyers offer for this implied as-
 sent. Where the husband allows his
 Wife generally to contract for him,
 her contracts are binding upon him,
 or where this licence is not general,
 yet if he suffers her to contract for
 him in a certain line of busi-
 ness, her contracts in this business
 are equally binding upon him
 as his own. So far the evidence
 of his implied assent is clear.
 In this case there is a fair presump-
 tion that he ought to be liable.

The wife runs in debt for arti-
cles for family use tho it may
not be usual for her to purchase
them the trust is liable - for it is
presumed "that a reasonable being
would wish to have his family
provided for" - Here the evidence of
the agent begins to grow a little
obscure, - but if there was no greater
absurdity in any of their presump-
tions they might be borne with -
We will now suppose the Wife is
turned out of Doors by the trust,
he is still liable for her contracts
in necessaries - the law here intro-
duces the strained presumption
"that no man (even if he had a
disposition to kick his Wife out
of Doors) could possibly be so hard-
hearted & cruel as to refuse her
the necessaries of life". This may
be the case, but it strikes me that
if the Trust had proceeded to

494
far as to drive his wife out of doors,
she would conceive it a tolerable de-
cent hint that he was willing to de-
prive her of any thing - and contrary
to what the law presumes, I believe
she would be apt to presume "that
her husband had no idea of assenting
to her liarains" -

We have not yet arrived quite
at the pitch of their inconsistency -
Let us go one step farther & we shall
may mark out the ~~boundaries~~ ne plus ultra of human absurdity -
When the husband in sound mind abso-
lutely prohibits ~~his wife~~ any person's
trusting his Wife, even in this case
where there is as express a dissent
as language will admit of. The law
will hunt for an assent. Here in
a golden fence the faculties of the
husband's mind are to be so disordered
that he is directly made a Lunatick -
The mode of proving this lunacy is

a little curious - It is taken for granted that human nature is so perfect "that no man in his senses could help but assent to the contracts of his wife for necessaries."

The intimate design of the law is well enough - It is founded in the good policy that when the husband turns his wife out of doors, or unreasonably refuses her the proper necessaries of life she may herself contract for them up on his credit - But why should not the law express itself with boldness & simplicity "That the husband should be liable in these cases, his dissenting or assenting being altogether immaterial" - I can conceive of no necessity for this perversion of terms in order to discover an assent where there evidently can be none, & it seems to encourage an ~~uncontracted~~ ^{uncontracted} mode of thinking which is degrading to reason.

Where the Wife voluntarily elopes ¹⁹⁶
if the person trusting her had no
notice of her elopement, the husband
is ~~not~~ ^{on principle} liable, ~~but if~~ ^{if he returns &} she returns &
he refuses to receive her, he again
becomes liable.

The husband is liable for all the Wife's
torts civilliter, ^{committed} before & after marriage -
For her torts committed whilst joint she is liable with the husband & on
his death, she becomes liable alone -
In case of torts after marriage com-
mitted in his company, they are in
law his torts & he alone is liable ^{according to some lawyers} al-
tho they were done against his will,
~~except for the great crimes of Treason~~
~~murder & felony~~ For the Wife's torts
criminally before marriage & those
after marriage committed in the
husband's absence, she alone is liable.
But for those committed in his com-
pany he is liable alone - unless
it be for ^{three torts which are called crimes} ~~the great crimes of Treason~~
~~& felony &c~~ For if it is presumed
that it appears to have been committed agt. his will the action should lie
not agt. the wife alone.

that they must have been done
by his compulsion - as the wives
while in their husbands presence
lose all notion, & are just fem-
ale machines that they can do no
wrong unless by a mechanical im-
pulse. This principle is nearly re-
lated to the notorious paradox
beforementioned, in which the hus-
bands agent is implied where his
agent is expressed -

Of Parent & Child

As it respects their right of
justification of each other in
case of a Battery -

Parent & Child are allowed
reciprocally to justify or assist each
other in case of a Battery. It is how-
ever a duty incumbent on them
when one is about to assist the
other to enquire into the motives
of the quarrel. & if the motives are
justifiable the son may assist the

Father & vice versa - If on the con 498
trary the motives are unjustifiable, no
violence is permitted to be used against
their antagonist with impunity, the
Law being careful to observe that
they do not improve their privilege
as an instrument to shelter themselves
from justice. There may be instances
however where the circumstances of
the case will not admit of a discov-
ery of the motives. As where the Son
finds his Father fighting & is igno-
rant of the motives, he may assist his
father ^{so far as is necessary to preserve him from injury, but} ~~as he crosses the highway~~
~~not for as to preserve his father's honour, unless it turns out that~~
~~ever a moment & it turns out that~~
~~his father was on the justifiable side~~
~~the father was on the unjustifiable~~
~~sides, the son is not liable for the dam-~~
~~ages, but the father.~~ In ^{such} ~~that~~ case if
the Son had had the means of know-
ing the motives of the quarrel they
being unwarrantable his privilege
would not have protected him.
When one of them is engaged on
the defensive the case is clear, they

have a mutual right to beat the offender without liability to pay damages. This reciprocal right of justification which the Law allows parents & children appears to be a reasonable indulgence, - as it encourages that natural affection which is expected as indispensable from persons so intimately connected by the bonds of nature -

Master & Servant

As it respects the Masters liability for the Servants fraud -

As it is inconvenient & indeed impossible for men always to transact their business personally, the law indulges them with the privilege of doing it by representation. To prevent any mischief that might arise from this practice the Master is made liable for the Servant's fraud. It is a general rule that the Master shall be answerable for the Servant's fraud practised when employed in

his business - The venerable 500
Holt & I believe other judges have
regarded this as a sacred Maxim lia-
ble to few, or no, exceptions, altho some
of them have widely departed from
it in their decisions - As the author-
ities upon this subject are totally
irreconcilable, no governing prin-
ciples can be drawn from them -
We must therefore have recourse to
particular decisions in order to come
at the law -

There is the case of
counterfeit jewels reported in *Broke*
James, ⁴⁶⁹ in which the Master was not
made liable. It appeared that the
Servant was sent by the Master
from England to Barbary for the pur-
pose of selling jewels - that they
both knew them to be counterfeit -
that the Servant asserting them to be
good jewels, sold them for 700£ above
their real value - and that the Master
received from the Servant the money
~~thus~~ fraudulently obtained - But he

because it did not appear that the servant was ordered to conceal their being counterfeit, the Master was not made answerable for the fraud. It would seem by this authority as tho the Master cannot be liable unless where he commands or solicits the servants ~~to~~ⁱⁿ practice the fraud. This principle however will not hold good in a thousand other cases which are established to be law - as where a Merchant's Clerk uses fraud in selling goods, the Master is liable whether it was by his command or not. But in case of the jewels this rule is entirely disregarded - an innocent stranger is imposed upon, defrauded of his money by a rogue in the immediate execution of his Master's business, and finally thro the caprice of the judges defeated in his remedy against the wily man whom the Court and jury acknowledged to have received the money. At this case was attended with

no peculiar circumstances to take 502
it out of the rule, the decision being
founded entirely on the ground that
the servant was not ordered to commit
the fraud, it strikes me as being in the
face of a maxim that ought to be held
inviolable, as a deviation not war-
ranted by a color of reason or necessity.
Another case circumstanced exactly like
this was determined the other way. A
Merchant's Factor beyond sea, sold a
piece of silk for a different quality
from what it in fact was. Here again
it did not appear that the Master or-
dered him to cheat. But Justice
Holt was of opinion "That as Somebody
must be ~~deceived~~ by the Deceit, it was
"more reasonable that the man who
"employed & put confidence in the
"Deceiver should bear the loss rather
"than a stranger." In a case where the
point came up whether Postmasters
should be liable for their Servants
fraud, it was decided that they
should not on account of their ha-
ving such a multiplicity of Servants
(This is confirmed by several late decisions)
see 10 Rep. 666 see Doug. & Cooper

in their employ. Holt however dissen-
ted, and if there is no more solid rea-
son than that which influenced this
decision, it is probable that Holt's o-
pinion may yet prevail. It is obvi-
ous to see that a Master would be far
more careful to employ faithful
servants, if he was to be accounta-
ble for their frauds. It is deter-
mined that where ~~Masters~~ ^{Servants} cheat in
selling their masters goods at Public
auction the Master shall not be lia-
ble. There are many other cases where
the Master is made liable. As where
an innkeepers servant sells counterfeit
wine, or where a Goldsmith mixes
dross in his plate & the servant sells
it in either instance the Master
is liable to an action on the case.

Owners of vessels are also liable for
the fraud of their Captains & mariners,
by the Common Law to the extent
of the fraud, but by Statute to the extent

of the value of the Vessel & freight ^{See Espin. 624 or 1 Term Rep. 11. freight 504}

As there are no Statutes establishing any principles by which these cases are to be guided, the law is extremely fluctuating - & it appears a little extraordinary that a subject of ^{so much} importance should be left ^{entirely} with the whim of judges, the more extraordinary when we reflect that these judges have not ^{only} unnecessarily departed from the respectable old maxim of Common Law, but are continually running at right angles with their own adjudications - Finis

Curious opinion of the Sup^r C^t Litchfield
adjourn^d C^t Nov^r 1795 -

~~Second opinion of the Sup^r C^t Litchfield~~ ^{up} ~~in the case~~
A deed of land was offered as evidence - It was not introduced to try the title which it conveyed but came up incidentally - It was moved to prove the execution by comparing the handwriting of the witness^{es} the Justice ^{before} whom ^{it was} acknowledged - This was objected to on the ground that the best evid^{ence} ought to be produced & it did not appear but that the witnesses might have been dead at the time they were out of the state - Judges Mitchell & Huntington were for proving the handwriting of the Justice & not the witnesses - Sturges & Root considered both on the same footing but admitted neither to be proved - Adams agreed that they were on the same footing but was for admitting both to be proved he distinguished this case of the deed coming up incidentally & where the title to the land was in issue

Now far defects in pleading may be aided or
cured by a Verdict ————— by N. D. Esquire

After judgment upon issue to the jury the verdict may be arrested for the insufficiency of the declaration, plea, replication &c. But all defects which would be fatal on demurer are not causes for an arrest for they are said to be cured by the verdict of a jury. Since then some defects are curable by verdict & others not, the difficulty is to draw the line between these cases —

1. All irregularities in pleading as duplicity, ambiguity &c. & the omission of immaterial facts are cured by verdict — and ^{these} defects are cured not because they are supposed to be supplied by proof to the jury as it is sometimes pretended, but because it would be unreasonable to suffer one party to lead the other thro a trial and after a verdict obtained against him to unravel the whole business by reserving a mere formal objection to the end of the proceedings. A party therefore when he puts himself at issue to the jury is supposed to waive every objection, which he might have had to the form of the proceedings.

2. Where material facts are imperfectly stated, that is where they are stated, though not so fully as legal strictness requires, and which ~~possibly~~ might have been bad on ^{special} demurer, yet they are aided ~~by~~ by verdict.

3. Also where material facts are totally omitted

if they are the necessary concomitants of any material fact laid in the declaration, the jury must necessarily have found the facts omitted & are therefore curable by their verdict—

To attend to the reason of these rules—
The reason why any of these imperfections or omissions are cured by verdict in the two last cases is that they are supposed to be proved to the jury & hence it follows that when there is an omission of any material fact which ^{cannot be supposed to have been} ~~could not be~~ proved to the jury the defect cannot be cured by verdict— It is obvious that where material facts are imperfectly stated they are notwithstanding to be proved to the jury, for altho they are imperfectly stated, yet they are so far stated that the opposite party could know what he had to defend against— In many cases also facts which are totally omitted are so necessarily connected with ^{other} facts alleged in the declaration that those alleged cannot be proved without at the same time proving those which were omitted.— But where material facts are totally omitted and not thus connected with those stated, the party ^{cannot} go into the proof of them, for the opposite party has had no opportunity to prepare his defence against them. Therefore as it would be improper to prove a fact of that kind to the jury, there can be no presumption that it ^{was} ~~is~~ proved, there can be none that they have found it— For instance, if in a declaration

For inst. In Assumpsit where notice to the Dft is necessary to be stated. if notice is stated but the time where & the place where omitted which are material facts, now as notice could not ordinarily be proved without at the same time proving the time & place ^{and therefore could not surprise the Dft.} these may reasonably be presumed to have been proved to the jury.

But suppose notice is totally omitted ^{then} & there is no room left for presumption, for the reasons before mentioned. If a "corrupt agreement" is omitted in a plea of usury it is not cured by Verdict for the same reasons. Again if a consideration is omitted in Assumpsit it is not cured by verdict. ^{In} An action for keeping ^{this is not cured by verdict & so it is in every case where any fact is entirely omitted} an unlawfully Bull science is omitted, which makes a part of the gist of the action. See Bac Abi 5 vol. 316 page - Doug. 683 - 2 Salk. 662 1 Salk 364-129 and other cases in the books where it has been adjudged that the Verdict cures defects in the pleadings, if carefully attended to will be found to come within some of the rules & distinctions before made. But it is I say ingenious gentleman that all omissions in declarations are cured which by any possibility might have been stated and in short ^{that} to have a declaration bad after, there must be enough stated not only to shew that the Plf had no right in that action but also to shew

that he never could have in any other 508
This appears to be not only carrying the matter
further than the reason of the rule will warrant
but directly opposed to authorities. For in the action
for keeping the malicious Bull Science might have
been stated - so might a consideration in the Assump.
& certainly notice might in the implied Assumpsit.
Besides whenever a declaration is drawn & the
general issue pleaded the Jury are bound by their
oaths to find for the Plf if he prove the facts
which are alledged in his declaration. And this
being the case how can we presume they have
found any fact more than what is alledged?
~~in his declaration?~~ And this being the I conceive
we never can unless the fact omitted is circum-
stanced as before mentioned. But it is said
that the Jury are supposed to find every fact
which in point of law is sufficient to support
their verdict & that in the case of Assumpsit
where notice being necessary is omitted the jury
in finding the Assumpsit must have found
the notice. If this be the case then every de-
claration is aided, for there is none so bad
but what in finding a fact or facts the jury
may make it good - for inst. A. sues B. for
charging him with lying & the general issue

pleaded & the Jury find guilty, now why
not say that as the Jury have found guilt
and in the eye of law there is no guilt in
the charge of ~~charging a man with lying~~, therefore it must
be the jury have found actionable words,
VIZ. a charge of theft. And yet nobody will
pretend that this is the case. In short the jury
have nothing to do with any inference of
law. Their business is to find the facts to be
true or false which the Plf has stated and whe-
ther he has stated enough or not must be
determined by the Court whose business it
is to decide all questions of law. Finis

A postea is nothing more than the history
of the proceedings after issue is joined & the
case is sent out to trial before the justices
of assize & nisi prius, till it is brought back
to the Court from whence it was sent.
The proceedings are entered on record which
is called the postea.

New Trials are granted only for matters
 dehors the record. But arrests arise from,
intrinsick causes appearing on the record.

~~It is~~ when an Exorⁿ is used by a Justice for a sum beyond
his cognizance the officer would be liable as well as the Just^s & Plf.
If the Ex^r was under £20 the officer would not be liable for
it does not appear on the face of the Exⁿ that it is beyond
the Justice's jurisdiction for it might have been for an acknow-
ledged debt, in which case it was within his cognizance but if over £20 then

510

Of the Jurisdiction & Proceedings of
the Several Courts in Connecticut
By J. Reeve

In Connecticut there are several Courts for trying causes at Law and punishing offenders, with very different Jurisdictions. "A Justice of the Peace" has jurisdiction to try all ^{civil} demands which come before him as a Court of Law when the matter in demand does not exceed £ 4, except where the title of Land is concerned to which his jurisdiction does not extend — Securities for money & Bills of credit vouched with two witnesses are cognizable by him where the sum in demand does not exceed £ 10. Whenever an Officer receives a Writ upon mesne process or a Writ of Execution, returnable to a Justice, and shall not execute the same, or make a false or undue return, — for every such neglect or misfeasance the Officer is liable before the Justice to whom such writ was returnable altho the damages demanded exceed £ 4 — Justices are empowered to take confessions of debtors to the amount of £ 20 & this is not to be understood with costs inclusive — The Judgment of a Justice is final in a suit, brought on a security for money or Bills of credit with 2 witnesses & in which the demand does not exceed £ 10 — likewise in debt on judgment of a Justice if it does not exceed £ 10 — or on an Officers receipt for an execution pursuing the stat. mode of suit, except where the

Judgment on which. The execⁿ issued was by confes-
sion of the debtor for more than £20

In all other cases within the Jurisdiction of a
Justice where the sum ^{demanded} exceeds 40s there lies an
appeal to the next County Court which ap-
peal may be taken from a Judgment on a plea
of abatement or demurrer as well as the merits of
the case

If the Def^t pleads Title in an action of trespass
before a Justice he cannot try it, but must bring
the Def^t in a Bond not exceeding £20 to pro-
cute his plea & bring forward a Juri^t for the
trial of his title at the next County Ct

Justices have no cognizance in matters of Equi-
ty, neither can they grant a new trial - All
actions before a Justice must be tried in town where
one of the Parties lives - When a Justice renders a
judgment for more than £4 including cost, yet
a *fiere facias* may be brought against the Bail to
recover the amount of the Judgment before the same
Justice -

In all matters cognizable by a Justice he
has exclusive Jurisdiction except where an Officer
is sued for not executing or making a false re-
turn of a writ returnable before a Justice de-
manding more than £4 damages in which the
County Court have a concurrent Jurisdiction
with the Justice before whom it was return-
able - As there is no provision made by Law for
Justices to appoint auditors, it may be a ques-

512
tion whether they have any jurisdiction in matters
of account; and also whether they have a power
to try a *Jeire facias* against a Garnishee. But
general practice is in favor of their jurisdiction
in both cases. Neither is there any provision
made for giving bonds upon an appeal from
a Justice, but it is the universal practice to
take bonds. A Justice's jurisdiction to try civil
causes does not extend beyond the limits of his
own town where there is authority in the town
where the cause is to be tried proper to try
the same.

Of the Court of Common Pleas

The Court of Common Pleas have cognizance
of actions except those mentioned & a few others
of a particular complexion in which the
Superior Ct. have exclusive jurisdiction —

All actions wherein the matter in demand
does not exceed £ 20 where the title of land
is not concerned, and all actions on Bonds
or notes for the payment of money only & Bills
of credit vouched by two witnesses, unless where
a Justice has exclusive jurisdiction are heard
and determined by the Ct. of Common Pleas —
Whenever an officer is sued in account
for an Execution the judgment of the Court of
Common Pleas is final and in all actions of
account where auditors have been appointed
who have set & made their report, the judgment

of this Court is final. The same rule obtains in Book-debts after the return of Auditors— Likewise when a matter in controversy has been submitted to arbitrators by rule of Court the judgment of the Court on their return is final.

This Court has an exclusive jurisdiction of all matters in Equity from the smallest matter to £100. In all other cases cognizable by this Court there lies an appeal to the next sup.^r Ct. and the judgment of the Sup.^r Ct. is final in all matters which come before them by appeal.

Whenever an action is brought against an Officer in the Superior Ct. for not executing a writ returnable there, or for making a false or untrue return their jurisdiction is original & judgment final. (This last belongs to the head of the Superior Court.)

This Court has also ^{an original} final Jurisdiction where a *scire facias* is issued upon a judgment rendered by them. This Court hears & determines all writs of Error from the judgment of Justices & the Ct. of Common Pleas— They have power to grant Bills of divorce in certain cases— They have the exclusive cognizance of cases in chancery from the sum of £100 to £1000— Writs of Error may be brought upon proceedings in equity as well as law. It is the peculiar province of this Court to issue writs of Mandamus, Prohibition & Habeas Corpus.

Jury

All issues joined on a matter of fact in the Court of Common Pleas or the Superior Court shall be tried by the Jury except by agreement the

parties put themselves on the Court for trial 514

Default

Upon a default the Clerk of the Court makes up the damages (as it is termed "to be heard in damages") Likewise on a demurrer judgment is in chief, yet if it be requested the Court will hear the parties in damages - (Penalties set in equity are not Chancellor's -)

Upon the forfeiture of a Bond the Court will chancer down the Penalty to the Principal, ^{interest} & costs. So upon a Bond with a condition that may be broken at several different times & a writ is brought for the first breach the Court will render judgment for what is then in equity due & lodge the bond with the Clerk of the Court & upon a subsequent breach the obligee may have a scire facias to cite in the obligor to shew reason why judgment should not be rendered for a future breach -

In trials in Chancery the Court may enquire into the facts themselves by a Committee

Supreme Court of Errors

This Court has no original jurisdiction but is constituted solely for the purpose of trying suits in Error from the sup^r Ct.

Of Courts of Probate

This State is divided in districts in each of which there is a Court of Probate consisting of a single judge who has cognizance of the Probate of wills, of granting administration, of appointing guardians and acting in all testamentary matters. From this Court there is an appeal to the next Superior Court.

General Assembly

The General Assembly of this State is a C^t for the purpose of trying all suits brot against the State by an individual. It is also a C^t of Chancery for determining all cases in Equity which exceed £1600.

In all these C^{ts} they appoint their own Clerks except Justices who have none. The General Assembly also grant divorces where the Sup^r C^t cannot.

Process

The ordinary process in civil actions is by Summons or Attachment. These if returnable before a Justice may be signed by a Justice unless the debt be sued to answer out of the County in which he resides. In such case it must be signed by an Assist^t or Judge of the County or Superior Court, or by the Governor or Deputy Governor of the State. Unless it be a *scire facias* which may be signed by a Justice of the Peace.

Writs returnable before the County Court may be signed by the Justice or Clerk of the Court unless the debt belong out of the County, when they must be signed by an Assist^t as in case of a summons, unless it be a *scire facias* which must be signed by the Clerk, or an *Audita querela* which must be signed by the Chief Justice of the County Court. The Judges of the County C^t can only sign writs returnable before themselves or Justices of the Peace.

By a late Stat^t judges of the C^t may sign writs returnable before them at the debtor's live in what County he may.

Writs returnable before the Sup^r Ct may be 510
signed before a Justice unless the Dft be summoned
to answer out of the County in which he resides
in which case it must be signed by an As-
sistant Jc - Also in case of a Scire facias
which must be signed by the Clerk of Ct
to which it is made returnable in all cases -
yet if it be a writ of Error it must be signed
by one of the Judges of the Sup^r Ct. If an Au-
dita Querela by the Chief Judge. Writs re-
turnable before the Supreme Ct of Errors
must be signed by one of the Judges of that Ct.

Of Service

When one is sued by summons the writ
must be served by reading it in the hear-
ing of the Dft or by leaving a true & attested
Copy at the Dfts last usual place of abode -
But if ~~sued~~ by attachment it must be served
on the Chattels of the Dft and for want
thereof on his lands or body & by reading it
in his hearing or leaving a Copy - When served on
the person the body is held in custody to respond
judgmt & when the body is attached & final
judgmt rendered Ex^r must issue the Levied
on the body within 5 days after the rising of the
Court when personal property is attached it is
holden 4 months - If the estate is attached
the Officer must leave a true Copy of the attach-
mt with the Dft or where he has last dwelt
with his return thereon describing the estate.
If it be real estate he must also leave a Copy
with the Register of the Town where the land

lies with a description thereof within seven days after the attachment & before the expiration of the time limited by law for the service of writs.

Factors, Agents or Attornies

When a person is sued who is not an inhabitant of this State it is good service to leave a Copy with his attorney. In case estate is attached & the Dft has no attorney in this State any reasonable notice to him of the suit is sufficient. When the suit is against one not an inhabitant of this State a Copy of the Writ being left with any person having in his hands the debtors property or of him who owes the debtor as attorney or Trustee shall be good service & not only so but shall be a good lien on the estate of the debtor in such persons possession or on debts due to the debtor. And after the judgment against the debtor is had and non est as to the estate is returned on the Exⁿ a fieri facias will issue against such attorney and a recovery be had against him de bonis propriis to the amount of the debt if the attorney has so much in his hands and in that case the trustee ^{or attorney} is called upon as a witness to answer upon oath what effects of the debtor he has in his hands.

Of Service on a Community

It is a sufficient service to leave a Copy of the writ with the Clerk of the community or a Committee or if it be a township a selectman.

Of Joint Debtors

Wherever there are joint debtors & any one of

them does not reside in this State. The service of the writ on him or them who are in the State shall be sufficient & in case the absent delta shall suppose himself injured by the judgment rendered after such service he may obtain relief by Audita Querela

Of Limitation of Notice

When a writ is returnable before a Justice service must be made six days before trial, the day of trial inclusive - When returnable before any other Court service must be made 12 days before trial including the day of trial. When service is made on an attorney so there must be 14 days notice whether the writ is returnable before a Justice or other Court

The same rule obtains where an Officer is sued for not executing or making a false return.

Bonds for Prosecution

When a summons is issued if the Plf live out of the State he must procure a bondsman for prosecution and whenever it shall appear to the signing authority that the Plf altho he is an inhabitant of this State has not sufficient estate to respond the Bill of cost which may be recovered against him he ought to require the Plf to procure a Bondsman to prosecute. And in any other stage of the proceedings the Ct may order.

the Plt to find pledges for prosecution - Whenever an attachment issues a bond to prosecute must be given

Of Entering Bail

Whenever the body of the Dft is attached the Officer shall take Bail for his appearance at Ct. if sufficient Bail be offered - If no bail be offered or procured the Officer must keep his body in custody & have him in Ct. Whenever he enters Special Bail (or as the Eng. Law terms it "Bail to the action") he is again at liberty. If no Special Bail be entered he is to be committed to gaol & if he pleads he must plead in custody. When a Judgment is rendered by a Justice or the County Court and an appeal is moved for, bonds to prosecute the appeal are required. Where personal property is taken a replevin may be issued to restore the property to the dft upon his procuring sufficient bonds to answer all damages which the Plt may recover against the Dft. When & after a writ is returned forced it must be returned to the Ct. to which it is made returnable. - When an appeal is made it must be entered in the Dockets of the Cts of the Ct. before the 2nd opening of the Ct.

Of Pleas & Pleadings & 1st Of Abatement

When a suit is bro't to the Ct. & the proceedings are commenced, if the Ct. has not cognizance of the case, a plea to the Jurisdiction of the Court

is the proper plea. This is what is called ³²⁰improp-
erly a plea of a batem^t. We term it such & plead
it as such. When it is found that the Ct. has cogni-
zance of the case the next plea in order is a plea
of a batem^t. This is assigning reasons by the Dft.
why he should not answer to the Plff's writ -

It may be for some defect in the Writ, or irregularity,
or it may be for some requisite to obtain a Writ (as
not paying the duty by law required) or for an altera-
tion in the Plff's circumstances since the date of
the writ (as when a feme sole sues & marries) This is

This is a dilatory plea & if the Plff succeeds the
judgmt is a Respondeas ouster. If the Judgmt.
be that the writ abate the Plff may commence
a new suit. But when the Dft. pleads a fact
on which issue is taken & the jury try it, the judgment
is in chief. It is a rule in a batem^t that when they
are plead they must be so pleaded as to enable
the Plff to bring a true writ. A writ & declara-
tion in this state both go out together to be served
on the Dft. - We confound the terms thinking them
synonymous. But they do not mean the same.

The writ is the mandatory part addressed to the
Officer & continues untill the action is named.
Then begins the declaration - The date is applied
to both the signing & duty of the Writ. For any
fault in the declaration a plea of a batem^t is not
proper but a demurrer either general or special
as the case may be - Yet it is very common to
plead by way of a batem^t for a demurrable fault -
So that if the plea proves insufficient there may be a
respondeas ouster instead of a Judgmt. in chief -
a custom which encourages dilatory pleas & cannot be
justified upon legal principles -

There lies an Appeal from the Judgment of a Justice or the County Ct upon a plea of abatement if the case be appealable & it be a question of law to be tried & Error lies - When the Dft pleads a batemt & appeals & again in the upper Ct pleads an abatement also (for he may upon such removal change his plea) and judgment of respondeat ouster is again given against him, execution shall issue for that case altho he recover on the merits - It is usual in petitions in Chancery & for new trials to plead by way of a batemt matters which go not only to the form but to the substance of the petition - That which could be a general demurrer to a declaration is an abatement to a petition -

When a plea of Abatement is found sufficient the Ct shall have liberty to amend if the defect be in its own nature amendable - As in case of a misnomer in respect to the place of residence - Amendment may not be made when the matters to be amended are contrary to truth - As if the service of the writ appears by the Officers endorsement to be on Friday the day after the time of service is expired yet in fact if it was the day precedent it shall be amendable - but if it was served after the time there can be no amendment - Amendments are never allowed without paying costs -

Demurrer

When we find that the action is brought before the proper forum & there is no cause of abatement we then attend to the declaration & if we find it defective in point of form only we take advantage of it by special demurrer which is partly -

cularly assigning why it is deficient
 a demurrer admits the facts as laid in the
 declarⁿ to be true but denies their actionability.
 That there is no ground for a recovery even sup-
 posing them true - In many cases the demurrer
 goes only to the declⁿ which shews that there ought
 to be no recovery where something is omitted which
 if stated & true would be a sufficient ground - As
 where an action is brought in which the law requires
 that notice should have been given of a service
 performed or a debt due before an action could
 be maintained - Here the omission of Notice would
 be a ground of demurrer - for tho indeed notice
 may have been given & there is a ground of
 action yet both these ought to appear to the Ct.
 Upon such declⁿ being defeated a new action
 may be brought & the deficiency amended -
 At other times the demurrer goes to the action
 viz. when the pretended cause of action is
 such an one as is not recognized by law as a cause
 of action - In this case no declⁿ can be drawn
 consistently with the truth of facts which can
 be possibly supported - And a demurrer is not
 only ^{a bar to} that particular action but a judgment
 will be a bar to any subsequent action for the
 same cause - as if an action be brought upon a
 charge of lying - such a charge not being actiona-
 ble no declⁿ grounded on it can be supported
 Where the demurrer should be special & where
 general it is difficult to give a rule - Our
 practice is so loose in this respect that no very

accurate
A distinction can be made - I should suppose that
a general demurrer ought to be confined to what
I have called a demurrer to the action & that all
demurrers merely to the declarⁿ should be special.
This I mention as what would be a good gen-
eral rule but not in fact what takes place in
the English or our Courts - so that we may con-
tinue to draw the line that in all cases where
the demurrer goes to the action it is general, but
where there is a demurrer for a defect which is
merely an informality it must be special -
For other defects of a more considerable nature
as not alledging a consideration in Assumpsit
which if alledged would make a good declaraⁿ?
The common practice is to demur generally -
The judgment on demurrer is in chief - A demur-
rer may be taken in any stage of the proceedings
as well as to the declarⁿ. If to a plea it admits the
truth of the facts but denies them to be a good defense.
So to replications, rejoinders &c -

Pleas to ^{the} Action

When the action is brought before the proper tri-
bunal & can neither be abated nor defeated by
demurrer, the Dft may plead a plea in bar, or
the general issue as the case may demand -

The general issue may be said to be a total
denial of the facts alledged as not guilty
in Trespass &c, & nil debt in debt &c &c -

Under the general issue we are permitted by
statute to give almost every thing in evidence
as justification in slander &c - Indeed there

524
is nothing required to be pleaded specially by
our stat. except where the Dft is faulted by the
act of the Plf. as by a Release &c. And in some
cases where we may give the Special matter in
evidence it is common to plead specially - and
in some cases the practice of pleading specially
has been so uniform that I doubt whether
the Court would permit the Special matter
to be given in evidence tho seemingly war-
ranted by Stat. as Usury, duress &c

Plea in Bar

A Plea in bar is an answer to the Plf's charge
in the declaⁿ which admits as in case of the
demurrer the truth of the facts, but assigns
some ~~reason~~ new matter not appearing upon
the declaⁿ as a reason why the Plf should
not recover. As in debt or bond the Dft ad-
mits he gave the Bond but that he has al-
ready made full payment of it which is pleas-
ing in bar - When this reason is assigned the
Plf must answer it which is called a repl^y.
This may be either by demurrer which admits
the truth of the plea but denies its sufficiency
in law to overthrow the Plf's claim - As if a
def^t in a suit on a Note should plead
that it was usurious & neglects to alledge it
to be an corrupt agreement the Plf can demur
for want of this allegation which would bring
the question before the Ct whether such allega-
tion is ^{material} or not, or it may be by traverse of the

facts alledged in the plea which is a denial of the truth of facts & brings the question of the facts to the trial of the Jury - as when the Dft's plea is infancy - this is traversed - Infancy or not is the question. - Or the Plf's answer may be an admission of the facts stated in the plea at the same time assigning some reason not inconsistent with the declⁿ and which does not appear on the Declⁿ or Plea why the Dft ought not to avail himself of the matter alledged in the plea - as where the Dft pleads in bar his infancy, the Plf admits this fact but says that it is an insuffic^t bar to the action because the debt alledged in his declⁿ was for necessaries - To this replication the Dft must answer by demurer or traverse, or rejoining some new matter which has not appeared before in the course of the pleadings and so on till some issue in fact or law is joined between the parties. Whenever the issue is joined on a demurer, the demurer pervades the whole pleadings & goes back to the first defect - As in an action of Assumpsit, the declⁿ states no consideration & the Dft pleads such a plea as the Plf thinks ^{insuffic^t} defence, he therefore demurs to it & if it is found an ill plea - yet it is good enough for the Plf's Declⁿ which the demurmer reaches. Whenever the declⁿ counts upon some writing and does not recite the writing but counts upon it as the Plf considers to be the operation of law and the Dft conceives it to be directly contrary

and wishes to bring the question of law properly ⁵²⁰
before the Ct. he will pray over of the writing &
recite it verbatim & having then made it part
of the record will demur, for it now becomes
the same as if the Plf had recited it at large
which if he had done the Dft would have de-
murred to in the first instance - Whenever
an issue of fact is joined to the country if
the evidence admitted to support the fact
be such as in the opinion of the opposite par-
ty is insufficient in law he may demur to the
evidence - This is done by stating exactly
all that was testified at the trial in writing
& if true the opposite party must join -
The question is then before the Ct whether
the evidence is sufficient or not - There is no
contention what the evidence is. This is
all settled by the demurer except the op-
eration of it - It is frequently litigated in
the course of trials whether the witnesses
adduced be legal and whether the matter
offered be pertinent to the issue - The
first may happen when contended that the
witness is interested. The last may be ex-
plified in this manner - where Usury is
pleaded & the Dft knows that it can't
be proved & offers evidence of another kind.
When therefore you suppose the Court admits
an improper witness or suffers improper
matter to be given in evidence you may
file a Bill of exceptions stating the whole matter

as it appears before the Ct. which the Judge must certify to be true - This lays a foundation for a writ of error, in which writ the same question if they reverse it is tried in the Upper Ct. as in the lower Ct. If the Upper Ct. affirms the judgment of the lower Ct. there is an end of the matter -

Of Motions in Arrest

A motion in arrest may be made after Verdict for the insufficiency of the Declaration, Plea, Replication - as in Slander the charge is for calling the P^l a liar - the D^f pleads not guilty - Verdict Guilty The D^f may arrest the judgment as no fault is maintainable for such charge - So also in Warranty if the J^{ry} omits to insert a corrupt agreement altho the Jury find it to be erroneous & judgment is the P^l's favor it may be arrested - and in this case a repleader is ordered -

But where is such deficiency & no good ground for a fault no repleader is ordered for this puts an end to the business - Many defects which would have been fatal in demurrer are aided by Verdict & cannot be taken advantage of in arrest of judgment - If upon ~~reviewing~~ ^{reconsidering} the Declaration something is omitted which if it had been alleged would have rendered it sufficient it shall be presumed that it was proved to the Jury otherwise they would not have given a verdict for the P^l since it was necessary to be proved in order to entitle him to a recovery such omission is aided - As suppose a declaration

motion in Assumpsit where law requires 528
notice to be given and notice is omitted there
is good cause of demurrer, but on motion in ar-
rest it shall be presumed that notice was proved
to the jury or there would not have been a ver-
dict for the p^l - see *Espar* 507 where this doctrine
is denied - But if it appears from the declarⁿ
that there could not be a ground for a recovery
that no supportable allegation could have
been inserted which would have rendered
it a good one the verdict does not, ^{and} such
defect - as where one is sued for calling another
a liar. —

Where there is motion in arrest for notice is
laid for error - It would seem that the rule
did not obtain respecting a verdict aiding
a plea in bar, or other subsequent proceedings
as in case of a declaration on contract. If a
plea of Usury is put in & no corrupt agreement
alleged altho the jury find in the words of
the plea that the contract was usurious, yet
the want of the term "corrupt agreement" is not
aided by the verdict. It would seem that by
finding Usury they had found the corruption
as case of "victims" &c. before put, but in that case
no notice is necessary to constitute the Assump-
sit, it is fair to conclude that when they had
found the Assumpsit that they also found
the notice - see the *Espar* - page 506. 7th - But
when there is a verdict on a special plea,
they do not find generally, but undertake to find
specially the whole matter - therefore when they
find that as being the whole matter & all the

particulars which they can find do not mention a corrupt agreement it is not fair to presume that they have found any corruption - But had the jury inserted in their verdict "corrupt agreement as they might have done, the plea would have been added.

In our Practice there may be many things which show the record which are reasons for arresting the verdict - as misbehavior in the jury, apparent mistake in casting or footing an account, improper writings being delivered to them in Et. &c. &c.

New Trials

After an final trial before the County or Sup^r Ct^s petitions for new trials are very common. The reasons for granting new trials are 1st mispleading: as where one has demanded where he ought to have plead the general issue - 2^d The discovery of new testimony which is material in the case - In this case the names of the witnesses must be inserted in the petition and the substance of what they will testify, or the petition must state - If these be inserted the Ct. will hear the witnesses & if reasonable will grant a new trial & when the petition is granted the first judgment is vacated.

A petition for a new trial before granted is no supersedeas to an execution on the first trial altho the evidence be new & if the petitioner knew of such testimony at the former trial & might have introduced it, it is no reason for granting a new trial. And if a witness at a former trial now undertakes to remember more than he testified then, no new trial will be granted for this reason - 3^d Another ground for granting such petition is - Exception

530 2
damages— This hardly ever prevails, it being
a rule with the Ct. that they will never grant
a new trial for excessive damages unless they
are erroneous & flagrantly excessive, such as
raise a strong presumption of partiality in
the jury— When the damages arise from con-
tract there is no necessity for this presumption
but it is discretionary with the Ct. in any excess
of damages. 4th ground is the smallness
of damages. This like the last scarcely ever
prevails. Courts have in some instances gran-
ted new trials because the verdict was against
law, but it is apprehended they do not view
it as a ground for a new trial.

5th That the verdict is against evidence.
But this is not to be understood when it is
the opinion of the Ct. against the weight
of evidence, but when there was no evidence
adduced on the successful side; when the
jury misbehaves, when one of them is cor-
rupted, when the witnesses are tampered
with, new trials are granted.

Special Verdict

When a case is committed to the jury, they
may if they please find the facts as proved, by a
Special Verdict and leave the question of law
to be tried by the Ct. This answers the same
purpose as a demurrer to evidence or filing a
Bill of exceptions after the verdict & lays a founda-
tion for a writ of error—

Of Writs of Error.

A writ of error lies both for error in fact & error in law - but it is not to be understood that it lies for any error ^{respecting} facts enquired into at the trial - for it is a settled rule that no such errors are to be alledged in the writ. What is meant by an error in fact may be thus explained - an infant is sued without mentioning any guardian of the Ct. will not appoint one - Judgment is rendered ag^t the inf^t. This altho it does not appear on the record where they appointed one or not is an error in fact & a ground for a writ. ^{error} Also having been served & judgment rendered by default it is an error in fact. Instances of these writs are rare. But writs of Error in law are very frequent - & may be brot in all cases where a question of law without mixture of fact has been decided by the Ct. provided the question made & decided appears on the record. Hence it is that Error lies upon a judgment in a latent where the matter in a latent was a question in law; - upon a demurrer to evidence, or a special verdict, or bill of exceptions & a ^{motion} matter in arrest provided the motion be some cause that appears on the face of the proceedings - To error lies in an interlocutory judgment till after final judgment, nor can an error in law and an error in fact be joined on the same writ. The general issue is in nullo esterratum. Upon a reversal of judgment of a lower Ct. the plaintiff in error recovers all that he has been

damnified but recovers no cost in the suit 592
in Error - yet we find in our Stat. that where
there is an erroneous judgment by a Justice or Court by
the P^lff may enter his action in the Sup^r Ct as if
it came there by appeal - This in practice
would be abused in many cases but in general
it is as well as where a Bill of exceptions has
been filed for the admission of a witness And in
pleas of abatement where the merits have not
been tried, it may be proper for the P^lff to enter
for instance A. sues B. & offers C for a witness -
he is objected to by B. but is admitted - B. is
cast in the suit, files his bill of exceptions &
brings error. The witness is adjudged inadmissi-
ble - now it would be unconscionable if A. might
not enter & have his action tried on the
merits. - Judgment in abatement is reversed
in favor of the original P^lff. he must enter
if he would have his cause tried -
Upon writs of Error for any such matter as
The last mentioned there can be no trial of
facts, because there is no jury -
Writs of error may be had in proceedings
in Equity as well as law. A writ of Error
is a superseas to an execution. Writs of error
without a Bond altho sufficient to try the
question of law and on which there may be
a reversal or affirmance, yet it is no super-
seas for it would not be reasonable to stop an
Execution if security was given to replead the de-
mages which such delay might occasion. And when
a reversal is obtained in the Ct of Errors upon a

Joint collateral to the merits - as upon pleas of a-
valent where the Ct had ~~had~~ rendered judgment
that it should abate - or in the admission of
Testimony the cause must be sent back to be tried
upon its merits for the Ct of Errors have no juris-
diction over them. When the error is in fact it is
to be ~~tried~~ before the same Ct if that Ct be a
Ct of Error -

Audita Querela

When the Dft is unsuccessful in his defence
Exⁿ will issue upon the Judgment ag^t him
unless some matter has arisen since the judgment
which if it would be taken notice of ought to
operate in his favor, in such case if he has had
no day in Ct to show this new matter in his
behalf he shall be entitled not pro speciali but
in debito to a writ of audita querela.

In this writ are stated the reasons why Exⁿ
should not be enforced - such as payment since
judgment - which by negligence, fraud or accident
is not endorsed on the Exⁿ. The Writ is directed
to the Officer who has the Exⁿ to stay all pro-
ceedings on the same until the complaint be
heard - It is signed by the Chief Judge of the Ct
after having examined & found probable cause
for the complaint - Upon this Writ bonds are
entered to make good all damages that may
be sustained if the complaint be not supported.
The object of the Writ is not only to set aside
the Exⁿ but also to recover the damages which
have been sustained - As if after payment of
the money, it had been again collected upon
the Exⁿ it would be to recover it back & is

in this case a concurrent remedy with an 534
actⁿ of Indeb. Assump. - It lies in all cases where
a man has by fraud been prevented from having
a day in Ct. to where A. sues B. & after service they
came together & entered into an agreement to stop pro-
ceedings & that the suit shall stop & be withdrawn
& B. gives himself no farther trouble about it: but
A. fraudulently proceeds & obtains judgment by
default. In this case B. shall be relieved by
audita querela

Of the Levy of Execution

Executions are levied upon the estate or body
of the debtor. If personal estate be turned
out by the debtor the officer cannot levy
on the body - before levy demand must be
made of the debtor (if he can be found) of the
money due - If personal estate is not turned
out the creditor has his election to take the body or
real estate of the debtor - When personal estate
is taken it must be advertised 20 days on the
public sign post & then sold at vendue & the
creditors paid. If levied on the body he is to
be committed to Jail & there remain till re-
leased by the payment of the money or taking the
poor-man's oath or by death - In these two
last cases the debt is not extinguished whilst
the body was in d'n - it was a temporary sa-
tisfaction but as soon as released by the payment
of the money taking the oath or by death, the
debt is revived - Thus the debtor's body cannot
again be taken but his estate may, which
could not be the case while the body was sold.

It will also ^{survive} ~~pass~~ against the Ex^r. If Real estate be taken it must be appraised by 3 freeholders of the town where the land lies and be returned to the office of the Clerk of the Ct. where the execution is - which shall be sufficient evidence of a title in the Creditor. If Chattels real or life estates are taken they are holden till the profits settled by the appraisers shall pay the debt. They then revert to the ^{original} owner.

It is a doctrine of the Books when an Ex^r has been justified by taking lands & the land did not belong to the debtor but was taken by mistake the debt is extinguished. This appears ridiculously unreasonable altho it might not be in the power of the Creditor to buy another ex^r, yet I see no reason why he might not have an actⁿ of debt or judgment on which an ex^r or fieri facias might issue. So if an Ex^r was levied on donor estate & the same was appraised at £10 p^r ani & extended for 10 years & he is dead at the end of 5 years & he dies, £50 of the debt is paid & if the left estate I should suppose a fieri facias against her Ex^r would recover the other £50.

Notes on The above Essay

13. New trials are not commonly granted to the Def where the action is founded in malice - but they are granted in favor of the publick weal. Can they be in favor of individuals? -

Bail
Bail upon writs of Error & audita querela should be sufficient to answer all damages as well as costs otherwise the Def in error being delayed until the property attached be dissipated by the intervention of 60 days after the judgment on the writ of simulation, ~~whereas~~ ^{precisely} the Bail might cover his

Security at the judgment should be affirmed 530
Bail on an appeal on judgment of a justice of the
peace in criminal matters is conditioned to oppose
& abide judgment. I am of opinion that all bonds
of appeal ought to be large enough to cover
all damages that might ensue from the appeal
such as Writs of Habeas Corpus according to the
Dower of Personal estate

Our Stat. gives $\frac{1}{3}$ of personal estate to the wife
on the husband's death, yet she may not hold it
as she may $\frac{1}{3}$ of the real against creditors ex-
cept such necessary household furniture as
is by law exempted from execution & parapher-
nalia — Of a Scire facias against Attornies &c

When exⁿ issues ag^t an absconding debtor
upon judgment the officer must repair to the
last residence of the debtor & make demand
& also make demand of the attorney &c, & if nothing
is shown him & he can find nothing whereon to
lay he returns what he has done & I think
Sometimes non est inventus

The Scire facias goes out ag^t the attorney
It is in the nature of a petition to the Ct.
wherein the judgment on which it was recovered
is stated to the Ct. the first judgment exⁿ & re-
turn &c. praying a remedy in the premises —
then proceeds the precept to the Sheriff &c
to cause the Att to appear & show reasons if
any why judgment should not be affirmed ag^t
him — signed by the Clk. of the County Ct. where
it is returnable. — But the attorney may turn
out the estate & satisfy the exⁿ if he please

and the principal shall account with him
for such amt.

Process

Under the head of process it ought to have
been observed that where there is a default to
be heard in damages the Ct without the in-
tervention of a jury assess the damages & from
this judgment there lies an appeal as in other case
and when such a judgment is rendered upon
some covenant in writing for damages that have
arisen, and yet there may be further damages
by reason of some future breach of the covenant
that when that event takes place a *scire-
facias* issues and go on *toties quoties* —

Finis

A suit is brot agt husband & wife for a debt of the wife
contracted whilst some sole & pending the suit, before
judgment the wife dies a great & unsettled question arises
"Can judgment in such case be rendered agt the
Husband?" On the one side it is argued "that the
reason why the husband is joined with the wife in
such case is not because he has got her property
for if it was so, he would be liable if she died
before the suit commenced which clearly is not the
case, but the true reason is that the wife, whose
property is taken away by the operation of law & who
is thus rendered incapable of discharging her debts,
should ^{not} be taken in execution & unreasonably con-
fined in jail. On her death therefore this reason
which is the only one why he should be joined,
ceasing, he ought not to be made liable."
On the other hand it might be said "that the
suit being commenced during coverture the right of

538
"the creditor attached itself to the trust" property
"I cannot be destroyed by the contingency of her
"dying before judgment" and this on the general
principle which governs all cases "That where
one's right is attached to another's property by
the commencement of a suit, such right shall
not be defeated by any contingency which may
happen before judgment"

Why may not a future court convey her
real estate subject the trust in cumbrance?
What is the reason in Eng.? The only reason
given there is that it cannot commence in
future; the estate would be suspended!!! &
it appears to us the English writers to imagine such
a case. But our L^{ts} have had sense enough
to abolish this maxim. What then can be
the policy of retaining it, the only reasons
on which they were founded failing?

When an actⁿ is brot on Stat. for a penalty
as in case of trespass for pulling trees &c the
damages must be estimated & appear on
the face of the declarⁿ.

A few flattering ideas which escaped me
in the first course of Mr Reeves Lectures -

Vol: 25-95 -
The wife's liability for her contracts
when under articles of separation -

See 1 Duran 5 In this case it is apprehen-
ded that the Reporters have not done the Judge
justice in relating their opinions - The case
was undoubtedly decided right but the ground
upon ^{which} it should ^{be} decided is not given us by the Reporters
To arrive at the true reason why a woman
thus separated from her husband ought to bind
herself by her contracts to the extent of such
contracts, we ^{ought} ~~must~~ ^{to} ~~obviously~~ consider the
reasons why she may not bind herself in
the same manner whilst they live together -
These are first, because the law has thrown
all her property into her husband's hands, & still
farther, it has given him the exclusive right
to her services & thus put it utterly out of
her power to fulfil her contracts. All ~~must~~
agree that these are the only reasons why
a woman under Coverture may not bind
herself by her bargains - If so it follows
as clear as daylight, that when these reasons
totally cease, ^{as} when the husband has renounced
as he ~~does~~ by articles of separation, all his
right to the property & services of his wife,
the law founded on these reasons must

546
of course cease & the wife bind herself as
well as tho she had never married.

For the authorities &c on this subject see the
1st vol. of these Lectures.

Powell in his Essay on Contracts speaks
largely against the above doctrine. He seems
to suppose that it is inconsistent with the
state of marriage, (which is ^{not formally} dissolved by the
articles of sepⁿ) that the wife should bind
herself by her own contracts. But this cer-
tainly can be no reason, ~~When~~ it is considered
that it has long been settled law, that she
may, when living with the husb^d, bind herself
by her bargains to the extent of her separate
property. — This is enough to shew that there
is no magic in coverture ^{itself} which disal-
les the wife from rendering herself liable to pay
or discharge her debts.

The husb^d's liability for his Wifes contracts

Where she goes from the husb^d & contracts
for necessaries accordg. to her rank, this distinc-
tion is to be observed as to when the husb^d is or
is not liable. — Where he was the criminal
cause of her departure as for instance if he
drives her out of doors, or if he so abuse her
that she is obliged to depart for safety &c he
is in all such cases liable for contracts for
necessaries. But on the other hand if she departs
without any sufficient cause, as where she

leaves him merely because she fancies he is
not the most agreeable partner, or where she
~~where~~ runs away with an adulterer which
it is apprehended ought to be ^{pleased} on the same ground
in such cases she cannot charge him ^{in point of principle} for
by her contracts - unless indeed she contracts
where he has usually allowed her & at the
time, the person who trusted her did not know
of her elopement. A case however was deci-
ded in Eng. against this last doctrine. The
wife eloped with an adulterer & lost goods
of a Merchant who knew not of ^{her} elopement.
It had been allowed her by her husband to con-
tract. The Merchant sued the husband & failed to
recover. But it is apprehended that this
case was decided on mistaken ^{what was} principles.
The Judges (as the practice is among the En-
glish Lawyers) looked to the rule of assent -
& tho they frequently find his assent where there
is an express dissent on his part yet in this
instance the Judges said that no man could
assent to the contracts of a wife who run off
with an adulterer, - They therefore refused
to make him liable. But to consider
this on principle recourse must be had to
other analagous cases. A Merchant for examp.
allows his Clerk generally to contract for him
& his Clerk runs away & takes up articles
on his master's credit of a person who knows

not of his having run off - or again a 542
man in any business employs ^{an} agent or
as the Law Expresses it a servant to contract
for him & the agent obtains property out
of another's hand on his master's credit &
takes this opportunity of running away
with such property. In both these instances
the master would ~~undoubtedly~~ indisputably
be held liable, ~~first for the Clerk's~~ ^{2d} ~~for his agents deceit~~ why then in the name
of common sense shall not the husb^d be
liable for his wife's contracts which she
makes with one not knowing her elopement
on the ground of her being the serv^t or agent
of her husb^d. Is it more reasonable that an
innocent man who has been allowed to trust
another's wife by ^{the} husb^d consent, lose his
money, or the ~~husb^d~~ who has put confidence
in his wife and suffered her to contract for
him - If we think in this case has resorted
to the true distinction that she ~~took~~ the inst^t
with her consent instead of buying for his (that
is, ~~discreet~~) then we should probably have answered
his wife with the Clerk & said I held that
with notice of the elopement the husb^d would
be released in the contracts of the wife
would be in the same position as the same
principles - A case in Str 875 where she
went away and not with an intention
he not liable

Sept 9 - Nov: 26th

What agreements between Husband & Wife are valid —

There is a circuitous method of conveying his real estate ~~to her~~ ^{to her}. This is done by his conveying it to one, who is to convey it to her ~~husband~~. It is thus continued because of the unity which is said to subsist between ^{them} & which would according to that idea prevent a direct conveyance from him —

The husband may convey an estate to her use, & ^{an} English Statute executing that use it amounts to a direct conveyance Co. Lit. 117-112 - 3 Atk 395 See also P. W. & M. & Bowel

The wife may give her separate property to her husband —

A man may devise ^{real} property to a feme covert ~~with~~ ^{give her} a power to convey it to whom she pleases. In such case she may execute that power in favor of her husband Co. Lit. 112 — Where the husband was indebted to the wife before marriage by bond, there has been a difference of opinion whether ^{or whether she might not sue his executors} such bond is discharged. The prevailing opinion is that it is ~~at the~~ not discharged.

It is agreed by all so far as this that it can't be collected during coverture, nor after that is ended provided he ^{as manager} tears off his name of how-
ever it is discharged ^{which is the probable idea}, clearly it cannot survive to her even if it was not torn off.

Of Parents & Child

On the Liability of the infant for his contract

The reason why a minor cannot bind himself by a Bond is not as is said, "because it is not proper ~~he~~ ^{for his benefit, that he} should subject himself to a penalty - for Courts of law will always chaffer down the penalty of a bond, even when given by adults - but the true reason is that the consideration ^{of a bond} cannot be enquired into -

He is not liable upon his contract as such but on the ground that he has had an article necessary for him & ought therefore to pay a quantum valebat. To show that this distinction is just & reconcilable to the authorities we need only remember, that he is not liable for articles not necessary altho ^{he} enter into ever so firm a contract; & on the other ^{hand} if he enter into no contract he is liable for what is necessary - as if a physician finds an infant in sickness & supplies him with medicine & altho the minor make no contract about it, he is liable -

It seems to be law that where a minor has entered into an innuental comp. independt he is not liable -

But the items of an innuental comp. may be enquired into - why therefore should he not be liable?

The way in which this absurdity has crept into the books it appeared to be this formerly the items of such acct could not be enquired into & then because it was not proper that minors should be answerable, but afterwards when the law was altered and the items were allowed to be gone into, it seems the Courts did not observe this but as they do

540

When his contracts shall be consid^d void & when
avoidable only -

In Cro: bar: 509 It is laid down that, ^{where} there is no semblance of advantage to the inf. it shall be absolutely void - but where there is a semblance of advantage voidable - he puts this case - as if an inf. give a lease without reserving rent, it is absolutely void, because on the face of the contract there is no semblance of benefit. But if rent had been reserved then not - This however L^d. Mansfield treats as an unreasonable distinction for the minor might have taken the rent when he gave the lease & must it be void in such case? Yes if that authority is to govern. L^d. Mansfield gives the true rule - He would treat the contract as void whenever it should be necessary to do this to shield the infant from injustice & oppression & in no other case -

In authorities Sec. Bur: 1794 - Str: 171-3 Mod: 248

2^d Ray? 443 - 1 Vent: 51. 1 Sid.: 159 1 Lev.: 169. 180.

His liability for his fraud

A minor is liable criminaliter for fraud, but from the Eng. authorities it would seem that he is not civiliter in a Ct. of Law, but whether a Ct. of Law now considers him liable, or not - it is certainly a Court of equity will. See 1 Vern: 132 - 2 Vern: 124 In all other cases they who are liable for fraud crim. are liable civiliter. If there is no reason why an inf. should not be ^{him liable} a hint in favor of making ^{him liable} See a case in 12 Vin: Abrid: 213

A reasonable settlement by a minor on his wife
& child in good in Chancery

Where in Eng^d an inf^t could get a judgment
vacated, our Courts would consider the whole trans-
action void, tho there is no practice with^{us} of vacating
the judgment formally. Hard: 376 1 N.H. 489

The manner of furnishing minors is different
from that of furnishing adults. Co. Lit. 247

In capital crimes it is the same with them
as others. But in moderate punishments as
in Fines &c where corporal punishments
are created by Stat. they are not inflicted upon
minors unless particularly specified by the Statute.
In such they are to receive the Com. Law punishment
only. Co. Lit. 357 1 Hawk. 147

For crimes of non-feasance an inf^t is never
to be furnished. As if A, B, C, D were in com-
pany & A should kill B. — If C & D were adults
they would be furnished for not preventing A.
But if minors, not furnishable.

A minor at 17 may execute a power over per-
sonal estate, for he is then of age to devise such prop-
erty. — But he cannot execute a power over real
estate where he has any interest, till 21. — he may
however where he is the mere instrument or conduit.
Pipe Sec. v. v. 299a

A minor cannot be consid^d in respect to take
decide &c. See 2 Vern. 710. Moore 177 637. Eliz. 113
1 N.H. 153 Tom. Ray^d 163. Carth. 309

Minors are not liable for their conduct as attorneys
in chancery &c. Co. Lit. 172 Lach. 169. Ord. 528 & Rep. 40-9
In respect of minor's liability for Bill of exchange &c. Carth. 160
He cannot be a surgeon Hob. 325

When a man enters upon a minor's land & holds possession, he shall not be consid^d a wrong doer so as to drive the inf^t to an action before he can gain possession but such trespasser's possession shall be consid^d the inf^t's possession.

2 Vern: 342-275 — Also after an ancestor declares the inf^t's entry shall not be taken away by the entry of another as if ^{the} care with adults.

A minor is however liable for waste even if not done by himself — [He is liable to no penalty in ^{these cases}]

If there is a condition annexed to land which the minor holds that the owner shall of such land shall repair the bridge he must repair it &c. Or if the estate is held upon any other condition — as if an estate is to commence on the inf^t's performing a certain act, or an estate is to be defeated on his doing a certain ^{act}, in the former case if he does not comply with the condition ~~the~~ the estate will never vest, & in the latter if he does ^{not} the act his estate shall be defeated — 1 Vent: 200 — 2 Rep: 44. Prec: Can: 565

2 Vern: 500 Co. Lit. 246-2 Salk. 415 Hect. 92 —

When a minor fails in a suit ^{lost by him} ~~execⁿ~~ goes out ag^t him, but the cost is finally recov^d out of the guardian a non est is to be returned as to the inf^t & then a *scire facias* on the judgment goes ag^t the guardian.

A minor must always defend by guardian.

All judgment ag^t minors not sued by guardian are erroneous — but such being errors in fact are to be enquired into by the same Court unlike errors in law —

Where several are issued & one of the rest a minor

A judgment is rendered agt all our C^{ts} will avoid the judgment as to the minor & let it stand as to others. When several have been concerned in a transaction and one only sued & the whole is recovered of him if the cause of action founded in contract, he can recover the several proportionable parts out of the rest, but if in tort it is otherwise.

Of Bastardy

Our County Ct has original jurisdiction in cases of bastardy. ^{It need not therefore be justified in the first instance} The process is always criminal till judgment & then it is civil. It is for maintenance only & not damages. The Ct compute the cost of bringing up the child for 4 years & calculate to make the father pay half that sum & the ex^{ns} in due quarterly. In the first is included expenses of lying in. He must find sureties by the judgment for the pay^{mt} of the \$30 or whatever sum & if he obtain none he will be committed & if bonds are given & ex^{ns} issues agt him & he imprisoned & swears out the bondsmen are liable.

Can there be appeals in such case from the County Ct? This depends upon the process being either criminal or civil. In criminal causes there is no appeal & to preserve a uniformity no appeal is allowed, the process being criminal in dress, the civil in its effects.

There have been contradictory decisions on this point but all the late cases are that there is no appeal. They may be, and are usually tried by jury. In criminal cases no depositions are admitted, & indeed none in any cases are admitted at Com. Law. This depends on Statute. These ^{cases} however being criminal in their process no depositions are admissible.

It has been the practice for the girl who prosecuted to give bond to answer for cost. but none are required the process being criminal and it being settled that no bond are necessary in any criminal cause.

(See a case in Kirby's Reports)

Of Common Recoveries & Fines

550

A Common Recovery is a fictitious action
In this lands are recovered from the owner, which
recovery binds all persons & vests a fee simple absolute
in the recoveror.

The fiction is carried on this way - The man
who wishes to sell land, suffers the purcha-
ser to bring an action for the land he claims
a better title than the tenant in possession. The
tenant appears & vouches in a man of whom
he pretends to have had the land to defend.
This vouchee appears & defends but the de-
mandant asks leave of the Ct to impanel
or confer privately with the vouchee. This con-
ference has the desired effect for the vouchee
appears no more, & the judgment consequently is
ag^t him by default & the tenant has judgment to
recover land of equal value of the vouchee
who happening to be worth nothing all the purposes
are answered for the demandant has now
a fee simple estate - & so much for this
nonsense

Of Fines & Common Recoveries

Fines are of great antiquity - There are instances of them before the Norman invasion. A fine is defined "The acknowledgment of a feoffment on record" & has all the force of a feoffment. It is indeed more sure for it is recorded in ^{the} Chirographer's office & indentures delivered to both parties. John Stiles wishes to sell a piece of land to Tom Jones - Tom must pretend a covenant on the part of Stiles to convey this land to him. On a supposed breach of this covenant Tom grounds an action of covenant & after paying a clever fee to the King he may proceed with his writ. After the suit is commenced, Stiles proposes to compromise matters without going thro a course of Judicial proceedings & Tom glad to see John so complying asks leave of the Ct. to settle the business which he is graciously suffered to do on his putting another fee into his majesty's pocket. The agreement is then made, noted & footed. The whole business is recorded & indentures delivered. A fine binds not only the parties but all other persons unless their claims are pursued within 5 years after the fine is levied - unless such persons were under particular disabilities & then 5 years are allowed after such disabilities are removed.

The beginning & ending of the
 reigns of the successive Kings of
 England

9	Egbert the 1 st monarch began	827
9	Ethelwolf his son	837
9	Ethelbald 1 st son of Ethelwolf	857
9	Ethelbert 2 nd son of Do	860
	Ethelred 3 rd son of Do	866
	Alfred 4 th son of Do	872
	Edward the elder	899
	Athelstan son of Edward the Elder	929
	Edmund 1 st the 5 th son of Do	940
	Edered son of Do	947
	Edway son of Do	955
	Edgar son of Do	959
	Edward the Martyr eld. son of Edgar	973
	Ethelred 2 nd half brother to Edward	979
	Swain the Dane	1013
Danes	Canute his son	1014
	Ethelred 2 nd again took possession	1015
Saxons	Edmund Ironside his son	1016
11	Canute again established himself	1017
Danes	Harold 1 st son of Canute	1036
	Edward the Confessor	1042
Saxons	Harold 2 nd son of Earl of Kent	1066
	William the conqueror (3 rd of France)	1066
Normans	William 2 nd son of the Conqueror	1087

These were Saxon Princes

Normans	Century	Henry 1 st son of Wm Cong ^r	Domini
		Stephen Stephen to Henry	1100
	12	Henry 2 nd Grandson of Henry 1 st	1135
	Leg ^m Wm	Richard 1 st son of Henry 2 nd	1154
		John son of Henry 2 nd mag. Chant ^r	1189
13		Henry 3 rd son of John	1199
		Edward son of Hen.	1210
		Edward 2 nd his son	1272
		Edward 3 rd son of Edw 2 nd	1301
	14	Richard 2 nd Grandson of Edw 3 rd	1321
		Henry 4 th Grandson of Edw 3 rd	1377
		Edward 4 th Desc ^t of Edw 3 rd	1399
	Henry 6 son of	Edward 5 th his inf ^t son	1422
		Richard 3 rd Brother of Edw 4 th	1483
	15	Henry 7 th	1493
16		Henry 8 th son of H. 7	1509
		Edward 6 th son of Hen. 8 th	1547
		James Gray his cousin	1553
		Mary daughter of Hen. 8 th	1553
		Elizabeth daughter of Hen. 8 by Abi. B. 1558	1558
		James 1 st of Eng ^d & 6 th of Scot ^h	1603
		Charles 1 st his son	1625
		Cromwell the usurper	1653
		Richard his son	1658
		Charles 2 nd son of Car. 1 st	1660
17		James 2 nd Brother to Car. 2 nd	1685
		William 3 rd Prince of Orange & Mary	1688
		Anne	1702
		George 1 st	1704
	18	Geo. 2 nd his son	1727
		Geo. 3 rd his Grandson to Geo. 2 nd	1760

(House of Plantagenet) Grandson of Henry 1st by his daughter
the Empress Matilda and her 2^d husband
Geoffrey Plantagenet.

1399 } House of Lancaster
1413 }
1422 }

{ House of York

{ House of Tudor

~~James 1st of Scotland~~

Great grandson of James 4th of Scot^l by Margaret daughter
of Henry 7th

{ House of Stuart

This Mary, wife of Wm was daughter of James 2^d & excluded the
son of James 2^d called the Pretender who went with
daughter of James 2^d - his father when he abdicated but was
excluded from the succession by Act of Parli^{am}
being a Roman Catholic.

{ House of Hanover

N^o 13 Elizabeth, daughter of James 2^d married the Elector Palatine
and left a daughter (Princess Sophia) who married the Duke of
Brunswick Lüneburg by whom S^{on} Sophia had George 1st
Elect^{or} of Hanover who took the throne by Act of Parliam^{ent}
expressly made in favor of his mother.



22